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No. _____

In The

Supreme Court of the United States

HONORABLE JOHN M. CHMURA,
JUDGE 37th DISTRICT COURT, WARREN, MICHIGAN,

Petitioner,

v.

MICHIGAN JUDICIAL TENURE COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A Michigan judicial canon forbids judicial candidates from making false statements "with reckless disregard" of their truth or falsity. The state's Judicial Tenure Commission challenged Judge Chmura's campaign literature under this canon. Michigan's Supreme Court held that in disciplinary proceedings an objective "reasonable person" standard of recklessness should be applied, instead of the subjective *New York Times v. Sullivan* standard. Does the First Amendment permit the use of this less protective standard where core political campaign speech is at issue?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Honorable John M. Chmura, respectfully petitions for a writ of certiorari to review the decision of the Michigan Supreme Court in this case.

OPINIONS BELOW

Michigan Supreme Court's opinion (Apx. at 1a), holding that an objective, reasonableness standard should be applied to determine whether alleged falsehoods by judicial candidates were made with a "reckless disregard" for their truth or falsity. (Reported at *In Re Chmura*, 461 Mich. 517, 608 N.W.2d 31 (2000)).

Michigan Judicial Tenure Commission's decision and recommendation for order of discipline, August 2, 1999 (Apx. at 33a).

Master's Report, by the Honorable John R. Kirwan, April 12, 1999 (Apx. at 71a).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), which permits United States Supreme Court review of final judgments or decrees rendered by the highest court of a state.

Petitioner seeks review of the Michigan Supreme Court's decision that an objective "reasonable person" test should be used to determine whether an allegedly false campaign statement by a judicial candidate was

made with a "reckless disregard" for its truth or falsity. This federal issue has been finally decided by the Michigan Supreme Court. Further disciplinary proceedings on the merits will take place on remand, but if petitioner ultimately prevails on the merits the federal issue will be mooted, and if petitioner were to lose on the merits, the governing law in Michigan would not permit him to again seek review on this federal issue. Therefore, this Court may exercise its jurisdiction before the completion of these disciplinary proceedings. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975).

This petition is timely under Supreme Court Rule 13, as it has been filed within 90 days after entry of the Michigan Supreme Court's March 28, 2000 decision.

CONSTITUTIONAL PROVISIONS AND JUDICIAL CANON INVOLVED

This case involves the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

The First Amendment forbids laws abridging the freedom of speech:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble and to petition the government for a redress of grievances.

The Fourteenth Amendment prohibits states from making or enforcing any law inconsistent with the mandate of the United States Constitution:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Judge Chmura was charged with misconduct under Canon 7(B)(1)(d) of the Michigan Code of Judicial Conduct. He successfully challenged the canon based on vagueness and overbreadth, and the Michigan Supreme Court rewrote the canon in its March 28, 2000 opinion so that it now reads as follows:

> CANON 7
>
> * * *
>
> B. Campaign Conduct.
>
> 1) A candidate, including an incumbent judge, for a judicial office:
>
> * * *
>
> (d) should not knowingly, or with reckless disregard, use or participate in the use of any form of public communication that is false.
>
> [*See* Michigan Supreme Court Opinion, Apx. at 26a-27a.]

STATEMENT OF THE CASE

A.

Judge Chmura's 1996 Campaign to Retain His Judicial Seat.

In 1996, Michigan Governor John Engler appointed John M. Chmura to fill a seat on Michigan's 37th District Court, which was vacant due to the retirement of Judge Chmura's predecessor. The timing of his predecessor's retirement meant that Judge Chmura would have to run to retain his seat in the November 1996 election. Judge Chmura assembled a campaign committee consisting of two attorneys and two political campaign consultants. One of the campaign consultants, in turn, sought assistance from a third attorney to conduct research for campaign literature. During meetings with his committee members, Judge Chmura spoke to them about adhering to Michigan's judicial canons regarding campaign conduct, and ensuring the accuracy of all campaign literature. During the two months before the November 5, 1996 election, Judge Chmura's campaign committee sent out several pieces of campaign literature urging Warren and CenterLine residents to vote for Judge Chmura. Judge Chmura did not personally research or prepare the ads, but his campaign committee assured him that their research fully supported the statements contained in the ads. Judge Chmura was satisfied that his committee members researched the factual statements contained in the material, and based on their assurances, he believed the ads were truthful.

One campaign ad described Judge Chmura's pursuit of a lawsuit on behalf of the Macomb County Taxpayers

Association before he became a judge. The lawsuit challenged the constitutionality of new state legislation aimed at correcting a perceived disparity in per pupil school spending, by shifting funds from what where considered to be more "affluent" school districts to those districts with less resources. The legislation was often referred to as the "Robin Hood" Act, and Judge Chmura's literature depicted a photo of former Detroit Mayor Coleman Young's face on a cartoon Robin Hood body. The ad proclaimed that while an attorney, Judge Chmura "stood in the way" of Mayor Young and other politicians' attempts to take money from Warren taxpayers. The ad used the pejorative term "stole" when referring to the statute's redistribution of taxpayer money, and in describing Judge Chmura's successful handling of the case, stated that Judge Chmura "took the state to court, arguing one appeal after another, until the state backed down and allowed your kids to benefit from your hard-earned tax dollars."

Another campaign ad referred to Judge Chmura's opponent James Conrad, the 37th District Court administrator and part-time magistrate, as a "bureaucrat," and discussed several criminal cases in which violent criminals were released by the 37th District Court with "slaps on the wrist." The ad responded to Conrad's campaign literature, in which Conrad touted his "tough decisions from a strong judicial magistrate!"

Another one of Judge Chmura's campaign ads addressed sexual harassment in the workplace and domestic violence. It contained photographs of a battered woman and a woman at a typewriter with a male hand on her shoulder. Portions of the ad also described a lawsuit

that was then pending against Judge Chmura's opponent, in which the plaintiff accused Conrad of sexual harassment and retaliatory discharge.

The final campaign ad at issue discussed "problems" of the 37th District Court, including violent criminals being released "again and again" to commit more crimes, a federal investigation into the court's probation department, and the sexual harassment lawsuit involving Judge Chmura's opponent. The ad also repeated the theme that Judge Chmura's opponent was in reality "just a bureaucrat."

B.

Proceedings Below.

In December 1996, a Macomb County, Michigan attorney complained to Michigan's Judicial Tenure Commission ("JTC") that several of the campaign ads distributed by Judge Chmura were "distasteful." In April 1998, the JTC filed a formal complaint against Judge Chmura, which was followed by various amended complaints. The JTC alleged that some statements in Judge Chmura's campaign ads were false, deceptive or misleading, and were made for the purpose of "wrongfully" influencing voters. The JTC also claimed that the depiction of former Detroit Mayor Coleman Young (an African American) was designed to appeal to racist attitudes among voters. The Michigan Supreme Court appointed an independent master – former Wayne County Circuit Court Judge John R. Kirwan – to conduct an evidentiary hearing, and to provide a report and recommendation to the JTC on what discipline, if any, was warranted.

The formal evidentiary hearing took ten days. Over 20 witnesses testified, and no less than 90 exhibits were admitted. In addition to defending the merits of the charges against him, Judge Chmura challenged the constitutionality of the judicial canon under which he was charged based on vagueness and overbreadth.[1] He also argued that under no circumstances could he be disciplined unless he were found to have made false statements with "actual malice," as contemplated in this Court's landmark *New York Times v. Sullivan*[2] case.

The master's report was filed in early 1999. The master agreed that Canon 7(B)(1)(d) was unconstitutionally vague and overbroad. He also found that in order for the canon to pass constitutional muster, it must be written "in a manner that avoids an abridgement of the candidate's freedom of speech rights as defined by *New York Times v. Sullivan*." (Apx. at 76a). The master found that the JTC's complaint did not allege actual malice as defined in *New York Times v. Sullivan*, nor did the JTC's proofs establish actual malice on Judge Chmura's part. In the second portion of his report, however, the master offered a contingent recommendation on the merits of the

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[1] Judge Chmura's answer to the JTC's original and amended complaints asserted that the canon was unconstitutional and infringed on his free speech rights. In its original form, Canon 7(B)(1)(d) prohibited judicial candidates from making any public communication that they "know or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading . . . ."

[2] 376 U.S. 254 (1964).

JTC's allegations, in the event the JTC or the Michigan Supreme Court ultimately disagreed with his finding that the canon was unconstitutional. He concluded that the JTC had sustained its burden of proof with respect to only two of Judge Chmura's campaign flyers, for the reason that "the average intelligent voter would have been mislead [sic] by the meaning conveyed to the electorate in these exhibits." (Apx. at 97a). He did not find that any false statements were made.

After considering briefs and arguments from the JTC's Executive Director and Judge Chmura's attorneys, the JTC issued a decision and recommendation for order of discipline rejecting nearly all of the master's findings. The JTC rejected Judge Chmura's argument, and the master's conclusion, that Canon 7(B)(1)(d) was facially unconstitutional. The JTC also indicated that it was "uncertain about the applicability of the *New York Times* . . . standard of 'actual malice' to judicial disciplinary matters," but found that Judge Chmura's conduct nonetheless satisfied the standard. (Apx. at 64a). The JTC found that four of Judge Chmura's campaign ads contained statements that were knowingly false, fraudulent, misleading and deceptive, and recommended to the Michigan Supreme Court that Judge Chmura be suspended from his judicial duties without pay for a period of 90 days.

Judge Chmura petitioned the Michigan Supreme Court to reject the JTC's recommendation. In a unanimous decision issued on March 28, 2000, the Michigan Supreme Court declared that Judicial Canon 7(B)(1)(d) was "facially unconstitutional." (Apx. at 1a-2a). Recognizing that Canon 7(B)(1)(d) "restricts political expression

that 'occupies the core of the protection afforded by the First Amendment,' " the court determined that the canon needed to be narrowed substantially to avoid infringing on protected speech. (Apx. at 16a, citing *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 346 (1995)). It therefore amended the canon to provide that a candidate for judicial office "should not knowingly, or with reckless disregard, use or participate in the use of any form of public communication that is false." (Apx. at 26a-27a).

Although this narrowed version of Canon 7(B)(1)(d) appears derivative of the *New York Times* "actual malice" standard, the Michigan Supreme Court "reject[ed] as inappropriate the subjective 'actual malice' standard employed in defamation cases." (Apx. at 28a, citing *New York Times v. Sullivan).* Instead, the Michigan Supreme Court "adopt[ed] an objective standard for determining whether a candidate uses a form of public communication during the campaign with reckless disregard of its truth or falsity," joining "courts in other jurisdictions that have adopted the objective standard in attorney disciplinary proceedings arising from a lawyer's criticism of a judge." *Id.* at 29a, 28a. Under this objective standard, a judicial candidate may "make statements supported by a reasonable factual basis, even if the candidate turns out to be mistaken." *Id.* at 29a.

The Michigan Supreme Court remanded the matter to the JTC for a determination of whether Judge Chmura engaged in conduct violative of the narrowed canon.

REASONS FOR GRANTING THE WRIT

I.

The Michigan Supreme Court erred by adopting an objective "reasonable person" standard to determine whether a judicial candidate's allegedly false statement was made with "reckless disregard" of its truth or falsity. The objective standard is inconsistent with United States Supreme Court precedent, and provides inadequate safeguards on speech that the Michigan Supreme Court acknowledged "occupies the core of the protection afforded by the First Amendment."

A.

There is continuing conflict among state supreme courts on whether an objective or subjective version of the *New York Times* actual malice test should apply in disciplinary proceedings.

1. Conflict in cases concerning judicial campaign speech.

Michigan's adoption of an objective "reasonable person" standard for determining whether a judicial candidate published a falsehood with "reckless disregard" of its truth or falsity stands in stark contrast to the Washington Supreme Court's admonition that anything less than a subjective actual malice standard is constitutionally intolerable.

In *In Re Kaiser*, 759 P.2d 392 (Wash. 1988), Judge Kaiser was charged with violating Washington's judicial canon prohibiting "false, misleading or deceptive campaign advertising," based on his statement that the "majority" of his opponent's campaign contributors were "DWI defense attorneys" – a statement later proven false.

Id. at 394-395. While the Washington Supreme Court was *"inclined to agree" that this statement was false,* it cautioned that in deciding whether the false statement violated the canon "we must carefully determine the constitutional limits of the Canon's application." *Id.* at 397-398.

The court refused to find misconduct because there was no "unequivocal evidence in this case that Kaiser actually knew his statements were false." *Id.* at 398-399. In reaching this conclusion, the Washington Supreme Court relied in part on its previous decision in *In Re Donohoe,* 580 P.2d 1093 (Wash. 1978). Misconduct had been found in *Donohoe,* the court explained, because the judicial candidate "had actual knowledge that her statement was false." *Kaiser* at 398. The court approved of the approach it previously applied (albeit implicitly) in *Donohoe,* where "a subjective test was applied." *Id.*

The Washington Supreme Court observed that Judge Kaiser's characterization of attorneys contributing to his opponent's campaign as "DWI attorneys" could be justified under a subjective standard, although the special master and commission found this characterization to be unjustified. The court was mindful that Judge Kaiser made the statements in the heat of a campaign, whereas the special master and commission were able to scrutinize the statements with the benefit of hindsight. *Id.* at 399.

2. Conflict in discipline cases arising from attorneys' public criticism of judges.

The conflict between Michigan and Washington is a microcosm of a broader controversy over the propriety of

a subjective or objective standard in professional disciplinary proceedings. The caselaw on this issue is predominated by disciplinary actions arising from alleged falsehoods published by lawyers engaged in the criticism of judges.

A number of courts have expressed the view that *New York Times* should be followed in disciplinary proceedings implicating First Amendment speech rights. In *Oklahoma Bar Assn. v. Porter*, 766 P.2d 958 (Okla. 1988), the Oklahoma Supreme Court refused to discipline an attorney who made derogatory statements about a judge after the judge sentenced his client. The court remarked that the "historic care taken by this Court to ensure that attorney discipline not exercise a chilling effect on First Amendment rights is wholly in keeping with the spirit of the later federal line of authority emanating from *New York Times v. Sullivan*." *Id.* at 968.

West Virginia's highest court also looked to *New York Times* for guidance in assessing the degree of protection afforded to an attorney's public criticism of a judge. It concluded that "such speech is not protected if it consists of knowingly false statements or false statements made with a reckless disregard of the truth," noting that "[t]his exception is found both in *Garrison* and *Pickering* [*v. Board of Educ.*, 391 U.S. 563 (1968)] and is the defamation standard for public officials found in *Sullivan v. New York Times* [sic]." *Committee on Legal Ethics of the West Virginia State Bar v. Douglas*, 370 S.E.2d 325 (W. Va. 1988).

In *Eisenberg v. Boardman*, 302 F.Supp. 1360 (W.D. Wisc. 1969), the United States District Court for the Western District of Wisconsin, relying on *New York Times*,

observed that "[p]ersons who make derogatory statements about judges are protected by the first and fourteenth amendments from imposition of civil and criminal liability, unless the statement is made 'with knowledge that it was false or with reckless disregard of whether it was false or not.' " *Id.* at 1362. While acknowledging that it had "not been made clear" whether a lawyer is protected from disciplinary sanctions "upon identical terms" as in *New York Times*, the *Eisenberg* court assumed for purposes of that case that "some areas of speech by lawyers which might be deemed disrespectful to courts or judges would be so protected." *Id.* Therefore, to the extent those disciplinary proceedings were premised on the respondent-attorneys' public statements about a judge, they could not be disciplined because there was "no allegation that any assertions made about the judge were made 'with knowledge that it was false or with reckless disregard of whether it was false or not.' " *Id.* at 1364.

Likewise, in *State Bar of Texas v. Semaan*, 508 S.W.2d 429 (Tx. 1974), the court expressed doubts that anything less than the *New York Times* standard would pass constitutional muster. The court observed that "persons who make derogatory statements about public officials, including judges, are protected by the First and Fourteenth Amendments of the United States Constitution from imposition of civil and criminal liability unless the statement is made with knowledge that it is false or with reckless disregard of whether it is false or not." *Id.* at 432 (citing *New York Times, supra*). Although the extent of this protection in the context of disciplinary proceedings had not been "authoritatively determined" at that time, the court observed that "[i]t is apparent from the language of

the unanimous opinion in *Garrison v. Louisiana* [379 U.S. 64 (1964)], that any bridle upon a free flow of information to the people concerning the performance and qualifications of public officials will have little chance of gaining constitutional approval." *Id.* at 433.

These courts are not alone in their view that the principles articulated in *New York Times* and its progeny mandate application of the subjective actual malice test in disciplinary proceedings. Many learned commentators share this view.[3]

A growing number of courts, however, have concluded that the subjective *New York Times* test is inappropriate in disciplinary matters. Minnesota, New York, Missouri, Indiana and the United States Court of Appeals for the Ninth Circuit, have determined that a "reasonable attorney" standard, rather than the subjective *New York Times* actual malice standard, should apply in disciplinary proceedings involving lawyer criticism of judges. *See In Re Graham*, 453 N.W.2d 313 (Minn. 1990), *cert. denied*, 498 U.S. 820 (1990); *In Re Holtzman*, 577 N.E.2d 30 (N.Y. 1991), *cert. denied*, 502 U.S. 1009 (1991); *In Re Westfall*, 808 S.W.2d 829 (MO 1991), *cert. denied*, 502 U.S. 1009 (1991); *Standing Committee v. Yagman*, 55 F.3d 1430 (9th Cir. 1995); *United States District Court v. Sandlin*, 12 F.3d 861 (9th Cir. 1993); *Idaho State Bar v. Topp*, 925 P.2d 1113 (Idaho 1996), *cert. denied*, 520 U.S. 1155 (1997). While often acknowledging that "[t]he United States Supreme Court has not directly

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[3] *See* articles cited in *In Re Graham*, 453 N.W.2d 313, 320 (Minn. 1990).

addressed this issue, and the state courts are in disagreement,"[4] these courts have nevertheless expressed confidence that the standard articulated in *New York Times* and *Garrison* is misplaced in the context of disciplinary proceedings.

The use of the less protective objective standard is typically justified by a purported overriding or counterbalancing interest in preserving public confidence in the judicial system. *See, e.g., Yagman, supra,* at 1437-1438. Another purported rationale is that disciplinary proceedings against attorneys or judges differ from civil or criminal defamation actions, which were the subject of *New York Times* and *Garrison,* in that disciplinary proceedings are designed to protect the profession and the public's interest in the administration of justice, instead of individual rights. *See, e.g., In Re Graham, supra,* at 322; *In Re Holtzman, supra,* at 34; *Sandlin, supra,* at 867.

The subjective versus objective test quandary is much more than esoteric fodder ripe for the musings of academics. The issue has very practical implications for those charged with the task of enforcing ethical standards, as well as those affected by them. Grappling with the permissible scope of such standards has been made increasingly difficult given the divergent court decisions on the books. Michigan's two legal disciplinary bodies could not even agree on the proper standard before the Michigan Supreme Court addressed the issue. While the Judicial Tenure Commission maintained that even an objective standard was too deferential to respondents'

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[4] *See, e.g., In Re Westfall, supra,* at 833.

First Amendment rights, Michigan's Attorney Discipline Board declared that a more lenient "objective" *New York Times* standard was unacceptable, noting the recent final approval of a Restatement provision "affirming that the *New York Times* actual malice standard applies to lawyer speech regarding public legal officials."[5]

B.

A subjective actual malice standard is necessary to avoid an impermissible chilling effect on judicial campaign speech.

1. The New York Times actual malice standard.

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), this Court established a high threshold for maintaining actions against those alleged to have published falsehoods about public figures – requiring proof that a falsehood was published with "actual malice" in order for it to be actionable. A statement was made with actual malice if it was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-280. The actual malice threshold is a formidable one, which reflects the Constitution's intolerance of any rule that "dampens the vigor and limits the variety of public debate." *Id.* at 279. Reckless disregard is demonstrated only with proof that the speaker "in fact entertained serious doubts as to the truth of his publication" when made. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

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[5] *In the Matter of Fieger*, 94-186-GA (On Remand) May 3, 1999, Attorney Discipline Board opinion.

Even a "[f]ailure to investigate does not in itself establish bad faith." *Id.* at 733.

2. This Court's rejection of an ordinary care standard.

Time and again this Court has rejected the notion that erroneous statements on matters of public concern are actionable upon a showing of mere negligence. United States Supreme Court precedent is "clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). The test that this Court "laid down in *New York Times* is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth." *Garrison v. Louisiana*, 379 U.S. 64, 79 (1964).

As this Court explained in *St. Amant v. Thompson*, preserving an atmosphere of free debate on matters of public concern is so vital to our system of government that a subjective actual malice threshold must be applied. Constitutionally intolerable self-censorship would be inevitable if erroneous statements were actionable based on mere negligence:

> Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But New York Times and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against

> self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones. We adhere to this view and to the line which our cases have drawn between false communication which are protected and those which are not.
>
> [*St. Amant, supra* at 731-732.]

3. This Court's application of the New York Times standard in campaign speech cases.

"The free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy – the political campaign." *Brown v. Hartlage,* 56 U.S. 45, 53 (1982). The First Amendment has been said to embody "our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad and candidates for political office." *Id.* at 60. "The people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits with conflicting arguments." *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 791 (1977).

"The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates." *Buckley v. Valeo,* 424 U.S. 1, 52-53 (1976). The "unequivocal

protection" afforded political campaign speech, *Brown* at 58, finds its underpinnings not only in the candidate's rights, but also in the public's right to information on the qualifications of candidates and their views on public issues during elections. *Id.* at 53.

"The chilling effect of . . . absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns." *Brown, supra* at 61. In recognition of this precept, this Court has observed that even untrue campaign statements are afforded protection, lest candidates be so fearful of the repercussions of inaccuracies that they cannot speak freely:

> Of course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements. But "erroneous statement is inevitable in free debate and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' " . . . Although the state interest in protecting the political process from distortions caused from untrue and inaccurate speech is somewhat different from the state interest in protecting individuals from defamatory falsehoods, the principles underlying the First Amendment remain paramount. Whenever compatible with the underlying interests at stake, under the regime of that Amendment "we depend for . . . correction not on the conscience of judges and juries but on the competition of other ideas." In a political campaign, a candidate's factual blunder is unlikely to escape the

> notice of, and correction by, the erring candidate's political opponent. The preferred First Amendment remedy of "more speech, not enforced silence," . . . thus has special force.
>
> [*Brown, supra* at 60, 61 (quoting *New York Times, supra* at 271-272; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974), and *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis J., concurring)) (citations omitted).]

This Court's mechanism for ensuring an atmosphere of free debate during campaigns for public office has been the subjective *New York Times* actual malice test. In *Brown v. Hartlage*, the Court concluded that the nullification of a candidate's election victory based on a mistaken statement during his campaign for political office was "inconsistent with the atmosphere of robust political debate protected by the First Amendment," where there was no showing that the candidate "made the disputed statement other than in good faith and without knowledge of its falsity, or that he made the statement with reckless disregard whether it was false or not." *Brown, supra* at 61-62.

St. Amant was also a campaign speech case. There, a candidate was sued for defamation based on alleged falsehoods made about the plaintiff, a public official, during a televised speech. This Court reversed state court decisions affirming an award of damages, because the state courts failed to properly apply the *New York Times* actual malice test. It was in this context that the Court spoke at length of the inadequacy of a reasonable person standard in cases concerning speech on public matters. *See discussion, supra.*

In *Schwartz v. Vanasco*, 423 U.S. 1041 (1976), this Court issued a memorandum opinion affirming a United States District decision recognizing "that any state regulation of campaign speech must be premised on proof and application of a *Times* 'actual malice' standard." *See Vanasco v. Schwartz*, 401 F.Supp. 87, 92 (E.D. N.Y. 1975). *Vanasco* involved state regulations purporting to prohibit campaign statements or literature containing any "misrepresentation of any candidate's qualifications," including the use of "personal vilification" and "scurrilous attacks." *Id.* at 88.

4. First Amendment rights must also be protected in disciplinary proceedings.

The notion of protecting First Amendment rights in the context of disciplinary proceedings is not new to this Court. This Court has recognized attorneys' First Amendment rights in a number of disciplinary cases concerning lawyer solicitations and advertising. Although a lesser degree of protection was afforded to the commercial speech at issue in those cases given its "subordinate position in the scale of First Amendment values," the degree of protection did not hinge on the nature of the proceedings. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *see also Shapero v. Kentucky Bar Assoc.*, 486 U.S. 466 (1988) (involved Kentucky Bar prohibition on lawyers soliciting legal business for pecuniary gain by sending letters to potential clients); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (involved disciplinary action against attorney who ran an advertisement offering to represent defendants in drunk driving cases

and refund their fees if they were convicted of the offense); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (seminal "lawyer advertising" case, involving disciplinary proceedings against attorneys who advertised their legal clinic and fee rates in newspaper).[6]

Even where an attorney made controversial statements about a pending criminal prosecution at a press conference before trial – in a manner creating a distinct risk of poisoning the jury pool – it was noted that "disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1054 (1991) (Kennedy, J., joined by Justices Marshall, Blackmun and Stevens).

The courts that have rejected the subjective *New York Times* test, in favor of an objective reckless disregard standard, have not purported that the First Amendment right to free speech has no application in disciplinary matters. They have instead seen fit to apply a less stringent test to protect what is admittedly protected speech. The question in the present case, therefore, is not whether the First Amendment applies in disciplinary proceedings, but whether a state may compromise the protections established by this Court to safeguard core First Amendment speech simply because the accusations of false statements come in the context of disciplinary proceedings.

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[6] It was only in the latter part of this century that commercial speech was afforded *any* constitutional protection at all. *See Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 761 (1976); *Ohralik, supra* at 455.

5. Where core political campaign speech is at issue, states may not disregard this Court's subjective New York Times standard simply because the proceeding is disciplinary in nature.

This Court has been steadfast in its rejection of a standard that would permit a person speaking out on public issues, or criticizing public figures, to be punished based on mere negligence. The courts that have adopted an objective reckless disregard standard have done so without any supporting authority from this Court. Indeed, they have done so in the face of *New York Times* and succeeding cases that have emphasized the "paramount public interest in a free flow of information to the people concerning public officials, their servants." *Garrison, supra* at 77. While these courts speak of the unacceptability of the subjective *New York Times* standard where speech is perceived to undermine the public's confidence in the judiciary, this ignores the fact that this Court did not waver from the subjective *New York Times* actual malice standard in *Garrison* even where the defendant-attorney's statements impugned the integrity of sitting judges.

The Michigan Supreme Court's notion that the *New York Times* actual malice test is inappropriate in disciplinary cases because it is a "defamation" standard is simplistic and inaccurate. This Court's precedent illustrates that the *New York Times* actual malice test is not relegated to the realm of defamation cases. Rather, it is a *constitutional* rule, also applied in other contexts where speech rights are threatened. *See, e.g., Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (teacher could not be discharged for letter

to editor criticizing school board, which contained erroneous statements, "absent proof of false statements knowingly or recklessly made by him").

The use of an objective "reasonable person" standard in disciplinary actions arising from campaign speech permits states to punish judicial candidates if the state opines that a hypothetical "reasonable" lawyer or judge would not have published a statement without further investigation. This is an amorphous standard that may be employed by states indiscriminately, with broad discretion. The risk of capricious prosecution is undeniable. Judicial candidates will have little to guide them in ascertaining what amount of investigation before speaking will be deemed "sufficient" to satisfy the disciplining authority. While the latitude attendant to this "reasonable person" inquiry may be acceptable in the tort system, it cannot be reconciled with the First Amendment or this Court's First Amendment jurisprudence. Self-censorship will be the consequence of an objective test.

The courts adopting an objective "reasonable person" standard also have the curious distinction of permitting a *recklessness* standard to be satisfied with proof of a far lesser degree of culpability – mere negligence. The objective test is internally inconsistent.

The inadequacy of the objective standard in safeguarding core free speech rights in the context of judicial campaigns cannot be illustrated any better than in the present case. Judge Chmura enlisted the assistance of a campaign committee comprised of consultants and licensed attorneys to research the factual basis for, and

prepare, his campaign literature. He advised his committee of the critical importance of ensuring the accuracy of the statements made in his campaign ads. He approved the ads only after receiving assurances that the matters discussed in them had been researched thoroughly and the accuracy of the contents verified. Even though Judge Chmura knew of no erroneous statements in the campaign literature, and entertained no doubts as to their accuracy, he may still be subjected to discipline if Michigan's Judicial Tenure Commission opines, and the Michigan Supreme Court concurs, that a hypothetical "reasonable" candidate would have entertained serious doubts as to the accuracy of the statements or done further investigation. This is hardly a standard that will avoid self-censorship by judicial candidates.

CONCLUSION

As in criminal and civil proceedings, the subjective *New York Times* actual malice standard must be applied in disciplinary actions concerning alleged false statements made by judicial candidates during campaigns for judicial office. The objective "reasonableness" standard adopted by the Michigan Supreme Court is internally inconsistent and fails to provide sufficient protection of core First Amendment speech where it has its most urgent application.

RELIEF REQUESTED

Petitioner asks this Court to grant his petition for a writ of certiorari.

Respectfully submitted,

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Michigan Supreme Court
Lansing, Michigan 48909

	Chief Justice	Justices
	Elizabeth A. Weaver	Michael F. Cavanagh
		Marilyn Kelly
Opinion		Clifford W. Taylor
		Maura D. Corrigan
		Robert P. Young, Jr.
		Stephen J. Markman

FILED MARCH 28, 2000

In re HON. JOHN M. CHMURA,
Judge,
Thirty-Seventh District Court,
Warren, Michigan.

No. 112062

BEFORE THE ENTIRE BENCH

CORRIGAN, J.

This disciplinary matter involves a challenge to the constitutionality of Canon 7(B)(1)(d) of the Code of Judicial Conduct, which governs public communications by candidates for judicial office.[1] We hold that Canon

[1] Canon 7(B)(1)(d) provides that a candidate for judicial office

> should not use or participate in the use of any form of public communication that the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading, or which is likely to create an unjustified expectation about results the candidate can achieve.

7(B)(1)(d) is facially unconstitutional. We therefore narrow the canon to prohibit a candidate from either knowingly or recklessly using forms of public communication that are false. Accordingly, we amend Canon 7(B)(1)(d) to provide that a candidate for judicial office: "should not knowingly, or with reckless disregard, use or participate in the use of any form of public communication that is false." Because the Judicial Tenure Commission (JTC) did not apply the narrowed canon in its initial decision, we remand to the commission for a determination whether respondent violated the narrowed canon and, if so, for a new recommendation regarding the level of discipline.

I. Factual Background and Procedural Posture

This disciplinary proceeding arises from respondent's 1996 campaign to retain his 37th District Court judgeship against a challenge by James P. Conrad, the 37th District Court administrator and magistrate. Respondent was appointed to the position in May 1996. Conrad ran against respondent in the fall election for the unexpired term.

A. The Campaign Literature

Respondent's campaign committee distributed four fliers that are the subject of these proceedings.[2]

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[2] The JTC complaint alleged violations involving six fliers, but the JTC ultimately found that exhibits 2 and 6 did not violate Canon 7(B)(1)(d). Although the JTC determination regarding exhibit 2 is troubling because that flier contains statements similar to those in exhibit 1 that the JTC found violated the

Exhibit 1 is a two-page flier entitled "Robin Hood?" The cover portrays former Detroit Mayor Coleman Young as a Robin Hood figure. The left page inside the flier contains a photograph of Mayor Young above the following text: "Coleman Young wanted your money, but one man stood in the way . . . Judge John Chmura." The right page contains a photograph of respondent. The text on that page states that "Coleman Young and the Lansing crowd cooked up a plan to take your tax dollars and spend them on Detroit's school districts. They called it Robin Hood-they stole from our taxpayers, our schools and our children to help prop up Coleman Young." It describes respondent's actions as "standing up to Coleman Young" and "standing up for your children." The text characterizes respondent's role in the lawsuit challenging the statutory scheme as taking "the state to court, arguing one appeal after another, until the state backed down and allowed your kids to benefit from your hard-earned tax dollars." Under the subheading "One Tough Judge," the text relates respondent's involvement in term limits and antitaxation causes before taking the bench. It further states that, as a judge, respondent has conducted himself in accordance with his prior actions by taking "one criminal after another off our streets." The flier then repeats that respondent is "always standing up for what's right." It also reiterates that respondent is "one tough judge." The back page of the flier contains a photograph of respondent with his family and lists his professional and civic affiliations.

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canon, we do not consider exhibits 2 and 6 because the JTC did not recommend discipline on the basis of those fliers.

Exhibit 3 is a one-page circular, folded in half, entitled "It didn't have to be this way." The cover contains a photograph of a partially obscured police officer in a patrol car. The inside of the flier contains a depiction of a mug shot with the caption "Murder . . . Rape . . . Dismemberment . . . Innocent Victims . . . Could Jim Conrad's Court have stopped it?" The accompanying text states that James Craig Cristini had appeared at least four times in 37th District Court during Conrad's tenure as court administrator and magistrate and had "received only a slap on the wrist" each time. It states that Cristini was "let back out for only $100" after being charged with assault and battery. The flier further states that "after being released on a second Assault & Battery charge, Cristini went on a rampage of murder and mayhem," resulting in "[i]nnocent victims, raped, murdered and dismembered." The text concludes with the following: "That's what happens when you put bureaucrats in charge of a court. Jim Conrad . . . He's just a bureaucrat." The back of the circular contains the text "End the Fear."

Exhibit 4 is a two-page flier entitled "We shouldn't have to worry about sexual harassment at work or violence at home!" The cover of the flier contains a photograph of a young woman sitting at a typewriter with a male hand touching her shoulder and a photo of a young woman with a young girl. The upper half of the inside of the flier is captioned "Magistrate Jim Conrad is facing trial for sexual harassment of a female court employee!" It includes a photograph of Conrad with a woman identified as a "former court reporter" leaning on his shoulder. The woman's face is obscured. Also included is a reduced image of a pleading described as a "Sexual Harassment

complaint filed against Magistrate Jim Conrad." The text states "Conrad tries to dodge trial by claiming 'government immunity.' " It explains in smaller type that Conrad "is accused of intimidating and firing a female court employee because she complained of being sexually harassed on the job. Papers filed with the court by Conrad's lawyers say that he can't be tried because, as Magistrate, he has governmental immunity!" It further states that the complaint had cost Warren and Center Line taxpayers "thousands of tax $$$ to defend! Now, he wants your vote for District Court judge!"

The bottom half of the inside of the flier is entitled "Judge John Chmura . . . . One Tough Judge" and contains two photographs of him on the bench, one of which shows him exchanging papers with Macomb County Prosecutor Carl Marlinga. The text states "Tough on domestic violence and stalkers!" It explains that respondent is "tough on criminals who prey on women" and "won't stand for acts of domestic violence or allow stalkers to run wild." It further states that respondent "won't tolerate sexual harassment of court employees," explaining that respondent "thinks your peace of mind comes first!" The bottom half of the flier also includes a favorable quote about respondent from Prosecutor Marlinga. The back of the flier contains a photograph of respondent with his family, a list of professional and civic affiliations, and a list of ten endorsers. The text also describes respondent as "one tough judge."

Exhibit 5 is a one-page circular, folded in half, that includes a drawing on its cover of a man leaving a courthouse asking the question "Where is my Courtroom?" The left half of the inside of the flier contains the

"answer": "Jim Conrad is not a Judge, he has no courtroom."

The right half of the inside of the flier is captioned "So what has Jim Conrad been doing as Court Administrator for the past 7 years?" The text below the question states "Murderers and Stalkers . . . , back on the streets . . . commit crimes again . . . " It explains: "In case after case . . . Murderer James Craig Cristini . . . Stalker Edward Lightfoot . . . Hardened, violent criminals appeared in the 37th District Court again and again only to be let out to commit more crimes." Under the heading "Corruption and Inefficiency," the flier states that federal investigators were looking into charges that the 37th District Court Probation Department "was running a scam under which court employees were receiving kickbacks, making big money off people's misery."

Under the heading "Sued for Sexual Harassment," the text states that "[w]hen court employee Carrie Meyer complained about the way she was treated at work, Jim Conrad threatened her job, demoted her, and harassed her." It further states that "Conrad's actions have resulted in a major sexual harassment lawsuit which has cost Warren and Center Line thousands to defend. But what's Conrad's defense? That he shouldn't be prosecuted because of government immunity." The text concludes with the statement "That's what happens when you put bureaucrats in charge of a court. Jim Conrad . . . He's just a bureaucrat." The text on the back of the flier states "No More Bureaucrats."

B. Judicial Tenure Commission Proceedings

The Judicial Tenure Commission filed a complaint in April 1998 alleging that respondent's campaign literature violated Canon 7(B)(1)(d) of the Code of Judicial Conduct. This Court appointed former Wayne Circuit Judge John P. Kirwan to serve as master in this case. Judge Kirwan issued a report after conducting an evidentiary hearing.

Judge Kirwan initially determined that the complaint should be dismissed because Canon 7(B)(1)(d) is facially unconstitutional. Judge Kirwan recognized that Michigan has a compelling interest in overseeing and regulating judicial elections. He nevertheless concluded that any canon or rule that attempts to restrict speech must avoid abridging a candidate's right to free speech as defined by *New York Times Co v Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964). Judge Kirwan determined that Canon 7(B)(1)(d) is not sufficiently specific to survive a constitutional challenge because it chills a candidate's right to free speech by not clearly apprising judicial candidates of impermissible comment.

In the alternative, Judge Kirwan assumed the constitutionality of the canon and the applicability of the "actual malice" standard enunciated in *New York Times, supra*. Applying that standard, Judge Kirwan determined the JTC failed to allege or prove actual malice regarding any of the exhibits. He further determined, however, that if the actual malice standard does not apply, the JTC proved that respondent violated Canon 7(B)(1)(d) by distributing exhibits 3 and 5. Judge Kirwan found that "the

average intelligent voter would have been misled by the meaning conveyed to the electorate in these exhibits."

After both respondent and the examiner objected to the master's report, the JTC held a hearing. Six JTC members thereafter found judicial misconduct predicated on exhibits 1, 3, 4 and 5. They recommended that this Court suspend respondent for ninety days for that misconduct. In a separate concurrence, one member joined the recommendation, but observed that judicial elections must be conducted in a dignified way and that candidates must not use false advertising methods. Two members dissented, but did not author separate opinions.

The JTC concluded that Canon 7(B)(1)(d) is not overbroad. It reasoned that the canon is designed to preserve the public's confidence in the judiciary by ensuring that judges do not lie or mislead the public. The JTC determined that a candidate's personal interest in being elected does not override the need for public confidence in the judiciary. The JTC explained that, under *McIntyre v Ohio Elections Comm*, 514 US 334; 115 S Ct 1511; 131 L Ed 2d 426 (1995), the state has leeway to regulate misleading statements made during a campaign. It concluded that the canon is sufficiently precise because it has no impact on truthful communications and does not inhibit candidates from offering opinions. The JTC reasoned that the canon applies only when a judicial candidate knows that a communication is false, fraudulent, misleading or deceptive. The JTC observed that the canon is further limited by the requirement that a misrepresentation be material.

The JTC expressed uncertainty whether the "actual malice" standard of *New York Times, supra,* applied to judicial disciplinary matters. It found, however, that in the event that the standard applies, respondent had acted with actual malice. The JTC determined that respondent's "calculated falsehood" satisfied the *New York Times* standard. The JTC explained:

> [W]e are persuaded that Respondent's campaign literature, individually and as a whole, reveals beyond any reasonable doubt a conscious effort to use false, fraudulent, misleading and deceptive statements as part and parcel of his campaign strategy. The materials themselves speak eloquently to this point, as they cover a broad spectrum of issues and are consistently untruthful. Additionally, we note Respondent's own statements about himself as an outsider faced with a hostile environment at the 37th District Court. Respondent had also experienced two unsuccessful bids for non-judicial office. As a result of such considerations, we find that Respondent decided to wage a "brass knuckles" campaign and followed through on that strategy in successfully retaining his judicial position.

Respondent petitions this Court to reject the JTC recommendation.

II. Canon 7(B)(1)(d)

Canon (7)(B)(1)(d) of the Michigan Code of Judicial Conduct provides that a candidate for judicial office,[3] including an incumbent judge,

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[3] Under MRPC 8.2(b), a lawyer who is a candidate for judicial office must comply with the applicable provisions of the Code of Judicial Conduct.

> should not use or participate in the use of any form of public communication that the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading, or which is likely to create an unjustified expectation about results the candidate can achieve.

We adopted Canon 7(B)(1)(d) and amended other canons in 1995 in response to a proposal by the State Bar Representative Assembly for a new code of judicial conduct. 449 Mich cxxvii; 442 Mich 1216. Before the amendment, Canon 7(B)(1) contained three precepts that guided a candidate's behavior during the campaign.[4] The source of those provisions is the American Bar Association (ABA) Model Code of Judicial Conduct of 1972, which

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[4] Canon 7(B)(1) of the Michigan Code of Judicial Conduct of 1974 provided:

> A candidate, including an incumbent judge, for a judicial office:
>
> (a) should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;
>
> (b) should prohibit public employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon;
>
> (c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; or misrepresent his identity, qualifications, present position, or other fact.

this Court adopted, with some variations, in 1974. 392 Mich xliii.[5]

In 1990, the ABA substantially revised the model code. Among other revisions, the ABA replaced the advisory "should" language with declarations regarding what a judge shall not do. Shepard, *Campaign speech: Restraint and liberty in judicial ethics*, 9 Geo J Legal Ethics 1059, 1066 (1996). Canon 5A(3)(d)(iii) of the model code governed a candidate's statements during a campaign for judicial office. It provided that the candidate shall not "knowingly misrepresent the identity, qualifications, present

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[5] This was not our first attempt to guide the conduct of judges. This Court first promulgated specific rules governing judges over fifty years ago. In 1947, this Court adopted the Canons of Judicial Ethics to set forth principles that would govern the practices of members of the judiciary. See Canons of Judicial Ethics, Preamble. Judicial Canon 4 provided that a judge's "personal behavior, not only upon the bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach." Judicial Canon 30 concerned a judge maintaining the appearance of impartiality during a campaign for judicial office.

This Court followed a trend toward statements of ethics for judges in adopting the 1947 canons. The ABA had promulgated the Canons of Judicial Ethics some twenty years earlier. The public responded favorably to the ABA canons. See Shepard, *Campaign speech: Restraint and liberty in judicial ethics*, 9 Geo J Legal Ethics 1059, 1063-1065 (1996). Before the 1947 canons, the same ethics rules governed judges and other lawyers in Michigan-the ABA canons of professional ethics. See 1935 Rules Concerning the State Bar of Michigan, § 14, 273 Mich xlii. Our 1947 canons then governed judges' conduct for almost thirty years, until shortly after the ABA promulgated a new model code.

position or any other fact concerning the candidate or an opponent."

The Representative Assembly of the State Bar of Michigan subsequently proposed a new Michigan code of judicial conduct patterned after the 1990 ABA model code. This Court published all but two of their proposed provisions for public comment in 1993. 442 Mich 1216. Among the other revisions, the Representative Assembly proposed a more far-reaching regulation of campaign speech than contained in the 1990 ABA model code. Proposed Canon 5B(3) contained the language this Court incorporated into Canon (7)(B)(1) in 1995. *Id.* at 1242-1243. The staff comment to proposed Canon 5B(3) explained: "The standard of accuracy in campaign communications is the same as the standard applied in the Michigan Rules of Professional Conduct for communications concerning a lawyer's services." *Id.* at 1243.

In amending Canon 7(B)(1) in 1995, this Court became one of the few state high courts to adopt broad restrictions on campaign speech by candidates for judicial office.[6] Today, we consider whether Canon 7(B)(1)(d)

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[6] Only three other states appear to impose broad restrictions on a candidate's campaign speech. Georgia Code of Judicial Conduct, Canon 7(B)(1)(d) contains the identical language as the Michigan canon, but provides that a candidate "shall not" use the form of public communication. Alabama similarly prohibits misrepresentations and deceptive or misleading statements. Alabama Canons of Judicial Ethics, Canon 7B(1)(c) provides that a candidate "shall not misrepresent his or her identity, qualification, present position, or other fact." Under Canon 7B(2) of the Alabama canons, a candidate may not

violates the First Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment. *Schneider v New Jersey*, 308 US 147, 160; 60 S Ct 146; 84 L Ed 155 (1939).

III. Constitutionality of Canon 7(B)(1)(d)

Respondent argues that Canon 7(B)(1)(d) of the Michigan Code of Judicial Conduct is unconstitutional and overbroad on its face and as applied to his conduct. We conclude that the canon is facially unconstitutional because it is not narrowly tailored to serve the state's compelling interest in maintaining the integrity of the

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> [p]ost, publish, broadcast, transmit, circulate, or distribute false information concerning a judicial candidate or an opponent, either knowing the information to be false or with reckless disregard of whether that information is false; or post, publish, broadcast, transmit, circulate, or distribute true information about a judicial candidate or an opponent that would be deceiving or misleading to a reasonable person.

Like Alabama, Ohio prohibits misrepresentations. Ohio Code of Judicial Conduct, Canon 7(B)(2)(f) prohibits a candidate from "[k]nowingly misrepresent[ing] his or her identity, qualifications, present position, or other fact or the identity, qualifications, present position, or other fact of an opponent." Ohio also imposes other detailed restrictions on campaign speech. Canon 7(D) provides that a candidate "shall not knowingly or with reckless disregard" (1) make false statements concerning specifically enumerated subjects, (2) make specific statements involving the use of a title, the term "judge," and the term "re-elect," or (3) state that a candidate has been "arrested, indicted, or convicted of any crime" without disclosing the outcome of pending or concluded legal proceedings.

election process and ensuring public confidence in the judiciary.

A. Application of the Overbreadth Doctrine

Initially, respondent may challenge the constitutionality of Canon 7(B)(1)(d) on its face. We accept respondent's argument that the overbreadth doctrine applies to this case. That doctrine permits " 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' " *Broadrick v Oklahoma*, 413 US 601, 612; 93 S Ct 2908; 37 L Ed 2d 830 (1973), quoting *Dombrowski v Pfister*, 380 US 479, 486; 85 S Ct 1116; 14 L Ed 2d 22 (1965). It thus allows a party to challenge a law written so broadly that it may inhibit the constitutionally protected speech of third parties, even though the party's own conduct may be unprotected. *Los Angeles Police Dep't v United Reporting Publishing Corp*, 528 US ___, ___; 120 S Ct 483, 488-489, 145 L Ed 2d 451 ___ (1999).

The overbreadth doctrine is an exception to the traditional rule of practice that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick, supra* at 610. The traditional rule "reflects two 'cardinal principles' of our constitutional order: the personal nature of constitutional rights and the prudential limitations on constitutional adjudication." *Los Angeles Police Dep't, supra*, 120 S Ct at 489. The overbreadth doctrine, on the other hand, rests on

the prediction that third parties will refrain from protected expression because of the statute. *Los Angeles City Council v Taxpayers for Vincent*, 466 US 789, 799; 104 S Ct 2118; 80 L Ed 2d 772 (1984). Under these circumstances, the "transcendent value to all society of constitutionally protected expression" justifies an exception to the traditional rule of practice. *Gooding v Wilson*, 405 US 518, 521; 92 S Ct 1103; 31 L Ed 2d 408 (1972).

The overbreadth doctrine is not, however, "casually employed," even in a case involving a First Amendment challenge. *Los Angeles Police Dep't, supra*, 120 S Ct at 489. Because it is "manifestly, strong medicine," the Court employs it with hesitation. *Broadrick, supra* at 613. Therefore, substantial overbreadth is required. *Id.* at 615. "[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Los Angeles City Council, supra* at 801.

Canon 7(B)(1)(d) authorizes disciplinary action for a candidate's speech during an election campaign, which is properly characterized as "core political speech." *McIntyre, supra* at 347. Further, the canon sweeps broadly, regulating all "form[s] of public communication."

That the canon is not a criminal statute is of no moment. *Los Angeles Police Dep't, supra*, 120 S Ct at 488. A candidate for judicial office who speaks out during the election risks adverse consequences for the content of his speech. The United States Supreme Court has, in fact, considered facial challenges to attorney disciplinary rules

that attach adverse consequences to public noncommercial speech. *Compare Gentile v State Bar of Nevada*, 501 US 1030; 111 S Ct 2720; 115 L Ed 2d 888 (1991) (considering a challenge to a disciplinary rule that restricted extrajudicial statements regarding pending adjudicative proceedings), with *Bates v State Bar of Arizona*, 433 US 350, 379-381; 97 S Ct 2691; 53 L Ed 2d 810 (1977) (holding that the First Amendment overbreadth doctrine does not apply to advertising by members of a profession).

Accordingly, a realistic danger exists that Canon 7(B)(1)(d) will compromise recognized First Amendment protections of parties not before this Court. Thus, respondent may facially challenge the canon on overbreadth grounds. *Los Angeles City Council, supra* at 801.

B. Level of Scrutiny

To determine the constitutionality of an ethics rule, we weigh the state's interests against the candidate's First Amendment interest in the kind of speech at issue. See *Gentile, supra* at 1073. Canon 7(B)(1)(d) restricts political expression that "occupies the core of the protection afforded by the First Amendment." *McIntyre, supra* at 346. Accordingly, we apply exacting scrutiny and uphold the canon only if it is narrowly tailored to serve a compelling state interest. *Id.* at 347.

In *Buckley v Valeo*, 424 US 1, 14-15; 96 S Ct 612; 46 L Ed 2d 659 (1976), the Supreme Court explained the importance of political speech:

> Discussions of public issues and debate on the qualifications of candidates are integral to the operation of the system of government

established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v United States*, 354 US 476, 484; 77 S Ct 1304, 1308; 1 L Ed 2d 1498 (1957). Although First Amendment protections are not confined to "the exposition of ideas," *Winters v New York*, 333 US 507, 510; 68 S Ct 665, 667; 92 L Ed 840 (1948), "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates. . . . " *Mills v Alabama*, 384 US 214, 218; 86 S Ct 1434, 1437; 16 L Ed 2d 484 (1966). This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co v Sullivan*, 376 US 254, 270; 84 S Ct 710, 721; 11 L Ed 2d 686 (1964). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co v Roy*, 401 US 265, 272; 91 S Ct 621, 625; 28 L Ed 2d 35 (1971), "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

Further, a candidate has a First Amendment right to discuss public issues and advocate his own election. *Id.* at 52. Therefore, when the state seeks to restrict this "core

political speech," courts apply "exacting scrutiny," upholding the restriction only if it is narrowly tailored to serve a compelling state interest. *McIntyre, supra* at 347; *Brown v Hartlage*, 456 US 45, 53-54; 102 S Ct 1523; 71 L Ed 2d 732 (1982).

We accept the principle that judges are different from legislative and executive-branch officials. By providing for the election of judges,[7] the people of Michigan have not transformed judges into legislators or executives. They have, however, adopted a method of judicial selection that takes place in the arena in which the First Amendment affords its broadest protection. That the candidate seeks judicial office does not change the nature of the candidate's speech for First Amendment purposes. Rather, the differences between judges and other government officials bear on the strength of the state's interest in restricting political speech. *Buckley v Illinois Judicial Inquiry Bd*, 997 F2d 224, 228 (CA 7, 1993). Accordingly, because Canon 7(B)(1)(d) restricts core political speech, we will uphold it only if it is narrowly tailored to serve a compelling state interest. *McIntyre, supra* at 347.

C. Application of Exacting Scrutiny

We conclude that Canon 7(B)(1)(d) serves compelling state interests. First, the state has a compelling interest in preventing fraud and libel. See *Garrison v Louisiana*, 379 US 64; 85 S Ct 209; 13 L Ed 2d 125 (1964); *New York Times*

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[7] Const 1963, art 6, §§ 2, 8, 12, 16. See also MCL § 600.8204; MSA 27A.8204 (providing for the election of district court judges).

Co, supra. "[T]his interest carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." *McIntyre, supra* at 349. States have an interest in preserving the integrity of the election process. *Brown, supra* at 52. This interest extends to protecting the process from distortions caused by false statements. *Id.* at 61.

The state also has a compelling interest in preserving the integrity of the judiciary. In *Stretton v Disciplinary Bd. of the Supreme Court of Pennsylvania*, 944 F2d 137, 142 (CA 3, 1991), the Third Circuit recognized this important interest:

> There can be no question . . . that a state has a compelling interest in the integrity of its judiciary. In *Cox v Louisiana*, 379 US 559; 85 S Ct 476; 13 L Ed 2d 487 (1965), the Court upheld a state statute barring picketing near a courthouse, pointing out that "[a] State may also properly protect the judicial process from being misjudged in the minds of the public." *Id.* at 565, 85 S Ct at 481. In another case, Justice Stewart said, "There could hardly be a higher governmental interest than a State's interest in the quality of its judiciary." *Landmark Communications, Inc v Virginia*, 435 US 829, 848; 98 S Ct 1535, 1546; 56 L Ed 2d 1 (1978) (Stewart, J., concurring).

The state's interest in the integrity of the judiciary extends to preserving public confidence in the judiciary. The appearance of fairness and impartiality is necessary to foster the people's willingness to accept and follow court orders. See, generally, Snyder, *The constitutionality and consequences of restrictions on campaign speech by candidates for judicial office*, 35 UCLA L R 207, 239-240 (1987).

The state's interest in protecting the reputation of the judiciary is also a compelling interest. *In re Kaiser*, 111 Wash 2d 275, 288; 759 P2d 392 (1988); see also Shepard, *supra* at 1067. We conclude, however, that Canon 7(B)(1)(d) is facially unconstitutional because it is not narrowly tailored to further the state's compelling interest.

In *Brown v Hartlage, supra*, the Supreme Court considered a Kentucky statute that voided an election because the victorious candidate had announced during his campaign that he intended to serve at a salary less than that fixed by law. The Court rejected the state's argument that its interest in protecting the political process from distortions caused by false or inaccurate statements justified the sanction. The Court concluded that, absent a showing that the candidate made the disputed statement other than in good faith and with knowledge of its falsity, or that he made it with reckless disregard of its falsity, the sanction "was inconsistent with the atmosphere of robust political debate protected by the First Amendment." *Brown, supra* at 62.

Brown, supra at 60-61, determined that First Amendment extends protection to all statements, but not the same level of protection:

> Of course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements. *Gertz v Robert Welch, Inc*, 418 US 323, 340; 94 S Ct 2997, 3007; 41 L Ed 2d 789 (1974). But "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to

> survive,' " *New York Times Co v Sullivan*, 376 US 254, 271-272, 84 S Ct 710, 721; 11 L Ed 2d 686 (1964), quoting *NAACP v Button*, 371 US 415, 433; 83 S Ct 328, 338; 9 L Ed 2d 405 (1963).

The Court then concluded that the harsh sanction, as applied to the candidate in *Brown*, did not afford the requisite breathing space. In so concluding, the Court explained that "more speech, not enforced silence" is the preferred remedy for untrue and inaccurate campaign speech. *Id.* at 61, quoting *Whitney v California*, 274 US 357, 377; 47 S Ct 641; 71 LEd 1095 (1927) (Brandeis, J., concurring).

Like the statute in *Brown*, Canon 7(B)(1)(d) attaches adverse consequences to a candidate's statements that are not knowingly false or made with reckless disregard for truth or falsity. The canon applies to any statement that the candidate "reasonably should know is false, fraudulent, misleading, [or] deceptive." It also applies to a statement that "contains a material misrepresentation of fact or law," and a statement that "omits a fact necessary to make the statement considered as a whole not materially misleading." It further prohibits a statement that is "likely to create an unjustified expectation about results the candidate can achieve." The canon, thus, essentially applies the restrictions imposed on lawyer advertising[8] to a candidate's political speech.

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[8] MRPC 7.1 provides:

> A lawyer may, on the lawyer's own behalf, on behalf of a partner or associate, or on behalf of any other lawyer affiliated with the lawyer or the lawyer's law firm, use or participate in the use of any form of public communication that is not

The Supreme Court has held that the state may prohibit false, deceptive or misleading lawyer advertising and advertising concerning unlawful activities. *Zauderer v Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 US 626, 638; 105 S Ct 2265; 85 L Ed 2d 652 (1985); *In re R M J*, 455 US 191, 200-203; 102 S Ct 929; 71 L Ed 2d 64 (1982). Moreover, although the First Amendment protects truthful advertising relating to lawful activities, *In re R M J, supra* at 203, 102 S Ct 929, the state may regulate it nonetheless if the regulation is narrowly drawn and directly and materially advances a substantial government interest. *Florida Bar v Went For It, Inc*, 515 US 618, 624; 115 S Ct 2371; 132 L Ed 2d 541 (1995).

Canon 7(B)(1)(d), however, regulates political speech, not commercial speech. The Supreme Court has emphasized that the state may regulate commercial speech to an extent that it cannot regulate core First Amendment speech. In *Florida Bar, supra* at 623, it explained:

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false, fraudulent, misleading, or deceptive. A communication shall not:

(a) contain a material misrepresentation of fact or law, or omit a fact necessary to make the statement considered as a whole not materially misleading;

(b) be likely to create an unjustified expectation about results the lawyer can achieve, or state or imply that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) compare the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

> We have always been careful to distinguish commercial speech from speech at the First Amendment's core. " 'Commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.' " *Board of Trustees of State Univ of NY v Fox*, 492 US 469, 477; 109 S Ct 3028; 106 L Ed 2d 388 (1989), quoting *Ohralik v Ohio State Bar Assn*, 436 US 447, 456; 98 S Ct 1912; 56 L Ed 2d 444 (1978). We have observed that " '[t]o require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.' " 492 US at 481, quoting *Ohralik, supra*, 436 US at 456.

We agree that the state's interest in preserving the integrity of the judiciary supports the imposition of greater restrictions on a candidate's speech during a campaign for judicial office than is permissible in other campaigns. See *In re Palmisano*, 70 F3d 483, 487 (CA 7, 1995). That interest, albeit compelling, does not, however, support applying permissible restrictions on commercial speech to what is core political speech. We conclude that Canon 7(B)(1)(d) unnecessarily circumscribes protected expression.

Canon 7(B)(1)(d) greatly chills debate regarding the qualifications of candidates for judicial office. It applies to all statements, not merely those statements that bear

on the impartiality of the judiciary.[9] A candidate for judicial office faces adverse consequences for statements that are not false, but, rather, are found misleading or

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[9] Canon 7(B)(1)(c) concerns statements that may prompt the public to question the impartiality of the judiciary. It provides that candidates for judicial office should not "make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." Courts of other jurisdictions have recognized that this and other similar restrictions serve a compelling state interest in preserving the fairness and impartiality of the legal system, but have differed on whether a particular restriction is narrowly tailored to serve that interest. See, e.g., *Stretton, supra* at 142-143 (upholding a judicial canon to the extent that the provision was narrowly interpreted to prohibit candidates from expressing an opinion only on issues that might come before them for resolution in their capacity as judges); *Buckley, supra* at 231 (declaring unconstitutional a judicial canon that prohibited candidates from announcing views on disputed legal and political issues); *Ackerson v Kentucky Judicial Retirement & Removal Comm*, 776 F Supp 309, 313-316 (WD Ky, 1991) (holding a canon unconstitutionally overbroad to the extent that it prohibited campaign commitments regarding administrative issues, but upholding a prohibition regarding issues that were likely to come before the court); *Republican Party of Minnesota v Kelly*, 63 F Supp 2d 967, 983-986 (D Minn, 1999) (upholding a canon that prohibited candidates from announcing their views on disputed legal or political issues on concluding that the Minnesota Supreme Court would narrowly construe it to apply only to issues that may come before the court for resolution); *Deters v Judicial Retirement & Removal Comm*, 873 SW2d 200, 204-205 (Ky, 1994) (upholding a judicial canon that prohibited candidates from expressing an opinion on issues that were likely to come before the court).

The JTC has not alleged that respondent violated Canon 7(B)(1)(c) by distributing his campaign literature. Accordingly, we do not consider the constitutionality of that canon.

deceptive. Further, the canon extends beyond the candidate's actual statement to permit discipline for factual omissions. Faced with the prospect of future disciplinary action, a candidate's safest course may sometimes be to remain silent on many issues. To avoid the risk of discipline, a judicial candidate will merely state academic credentials, professional experience, and endorsements received.

A rationale for judicial elections is that meaningful debate should periodically take place concerning the overall direction of the courts and the role of individual judges in contributing to that direction. Such debate is impossible if judicial candidates are overly fearful of potential discipline for what they say. By chilling this debate, Canon 7(B)(1)(d) impedes the public's ability to influence the direction of the courts through the electoral process.

We recognize that the broad language of the canon is intended to promote civility in campaigns for judicial office.[10] Nevertheless, the state's interest in preserving public confidence in the judiciary does not support the

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[10] Chief Justice Randall T. Shepard of the Indiana Supreme Court explained the rationale for this broad proscription on campaign speech in his law review article:

> The American tradition sets judges aside from the hurly-burly of sometimes unseemly political strife. We place courts and judges on a higher plateau and hope that in doing so they will act the part and ask us to do the same on matters of importance. Consignment of judges to regular rough-and-tumble politics makes the judiciary less capable of filling this role. [Shepard, *supra* at 1067.]

sweeping restraints imposed by Canon 7(B)(1)(d). The prohibition on misleading and deceptive statements quells the exchange of ideas because the safest response to the risk of disciplinary action may sometimes be to remain silent. The Supreme Court explained in *Brown, supra* at 61, that the preferred First Amendment remedy for misstatements and misrepresentations during the campaign is to encourage speech, not stifle it. We conclude that Canon 7(B)(1)(d) fails to provide the necessary breathing space to satisfy the First Amendment.

We therefore conclude that Canon 7(B)(1)(d) is not narrowly tailored to serve the state's compelling interests. As the Supreme Court observed in *Brown, supra* at 60:

> [The First] Amendment embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad, and between candidates for political office. The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech.

Accordingly, we hold that Canon 7(B)(1)(d) is facially unconstitutional.

IV. Saving Construction

Today, we narrow Canon 7(B)(1)(d) to prohibit a candidate for judicial office from knowingly or recklessly using or participating in the use of any form of public communication that is false. We therefore amend Canon 7(B)(1)(d) to provide that a candidate for judicial office:

"should not knowingly, or with reckless disregard, use or participate in the use of any form of public communication that is false."

Const. 1963, art. 6, §§ 4 & 30 empower this Court to control the conduct of members of the state judiciary. See *In re Probert*, 411 Mich. 210, 229-231; 308 NW2d 773 (1981). Exercising our authority, we have adopted the Code of Judicial Conduct to guide judges. We did not, however, intend to extend Canon 7(B)(1)(d) beyond proper constitutional boundaries.

We conclude that limiting the reach of Canon 7(B)(1)(d) to known false public communications and false public communications made with reckless disregard for their truth or falsity renders the canon narrowly tailored to serve the state's interest in preserving the integrity of elections and the judiciary. False statements "are not protected by the First Amendment in the same manner as truthful statements." *Brown, supra* at 60, 102 S Ct 1523. By limiting the scope of the canon to known and reckless false public statements, the canon provides the necessary "breathing space" for freedom of expression. *Id.* at 61.[11]

The determination whether a candidate recklessly disregarded the truth or falsity of a public communication is an objective one. We reject as inappropriate the subjective "actual malice" standard employed in defamation cases. *Bose Corp v Consumers Union of United States,*

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[11] Our narrow construction of Canon 7(B)(1)(d) mirrors MRPC 8.2(a), which governs a lawyer's statements regarding judges and other public legal officers.

Inc, 466 US 485, 511, n 30; 104 S Ct 1949; 80 L Ed 2d 502 (1984); *New York Times, supra* at 280.

In adopting an objective test, we join courts in other jurisdictions that have adopted the objective standard in attorney disciplinary proceedings arising from a lawyer's criticism of a judge. See, e.g., *Standing Committee on Discipline of the United States Dist Court for the Central Dist of California v Yagman*, 55 F3d 1430, 1437, n 12 & accompanying text (CA 9, 1995) (cases collected), *In re Graham*, 453 NW2d 313, 321-322 (Minn, 1990), *In re Westfall*, 808 SW2d 829, 837 (Mo, 1991), and *In re Holtzman*, 89 NY2d 184, 192; 573 NYS2d 39; 577 NE2d 30 (1991). But see *Eisenberg v Boardman*, 302 F Supp 1360, 1362 (WD Wis, 1969), and *State Bar of Texas v Semaan*, 508 SW2d 429, 432-433 (Tex Civ App, 1974).

As the Court of Appeals of New York observed in *Holtzman, supra* at 192, adopting a subjective standard "would immunize all accusations, however reckless or irresponsible, from censure as long as the attorney uttering them did not actually entertain serious doubts as to their truth. . . . " The state's interest in protecting the public, the administration of justice, and the legal profession supports applying a different standard in disciplinary proceedings. *United States Dist Court for the Eastern Dist of Washington v Sandlin*, 12 F3d 861, 867 (CA 9, 1993).

Yagman, supra at 1437-1438, explained the rationale for adopting an objective standard:

> [T]here are significant differences between the interests served by defamation law and those served by rules of professional ethics. Defamation actions seek to remedy an essentially

> private wrong by compensating individuals for harm caused to their reputation and standing in the community. Ethical rules that prohibit false statements impugning the integrity of judges, by contrast, are not designed to shield judges from unpleasant or offensive criticism, but to preserve public confidence in the fairness and impartiality of our system of justice. . . .
>
> Though attorneys can play an important role in exposing problems with the judicial system . . . false statements impugning the integrity of a judge erode public confidence without serving to publicize problems that justifiably deserve attention. *Sandlin* held that an objective malice standard strikes a constitutionally permissible balance between an attorney's right to criticize the judiciary and the public's interest in preserving confidence in the judicial system: Lawyers may freely voice criticisms supported by a reasonable factual basis even if they turn out to be mistaken.

We similarly conclude that an objective standard for determining violations of Canon 7(B)(1)(d) strikes a balance between the candidate's First Amendment rights and the state's interest in preserving confidence in the judicial system. Cf. *Yagman, supra* at 1438. The state's compelling interest in preserving public confidence in the judiciary supports applying a different standard than that applicable in defamation cases. Under the objective standard, a candidate may still freely exercise First Amendment rights and make statements supported by a reasonable factual basis, even if the candidate turns out to be mistaken. We therefore adopt an objective standard

for determining whether a candidate uses a form of public communication during the campaign with reckless disregard of its truth or falsity.

V. Application of Narrowed Canon to Respondent's Conduct

In *Osborne v Ohio*, 495 US 103, 115-122; 110 S Ct 1691; 109 L Ed 2d 98 (1990), the Court held in the criminal context that a state court may adopt a narrow construction of a statute in response to an overbreadth challenge and then apply the statute, as construed, to past conduct. The defendant must, however, have had notice, i.e., "fair warning," that his conduct was criminal. *Id.* at 115. Further, the defendant must have been convicted under the statute as it was subsequently construed, not as it was originally written. *Id.* at 118.

Applying *Osborne* by analogy to the disciplinary context, we conclude that respondent had notice that he was subject to discipline for knowingly or recklessly using forms of public communication that were false. Canon 7(B)(1)(d) provided that a candidate for judicial office "should not use or participate in the use of any form of public communication that the candidate knows or reasonably should know is false. . . . " The phrase "knows or reasonably should know is false" encompasses known false statements and those made with reckless disregard for their truth or falsity. Accordingly, respondent had "fair warning" that his alleged conduct was prohibited by the Code of Judicial Conduct.

Because the JTC did not have the benefit of our decision on the constitutionality of Canon 7(B)(1)(d) to

guide it in determining whether to recommend discipline, we remand for a determination whether respondent committed misconduct by violating Canon 7(B)(1)(d), as construed today.[12] If the JTC finds misconduct under the narrowed canon, it shall make a new recommendation regarding discipline.[13]

VI. Conclusion

We conclude that Canon 7(B)(1)(d) is facially unconstitutional. We therefore narrow the canon to apply only to public communications that the candidate for judicial office knew were false or were used by the candidate with reckless disregard for their truth or falsity. We further conclude that the determination whether a candidate recklessly disregarded the truth or falsity of a public communication involves an objective inquiry.

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[12] On remand, the JTC shall provide the parties an opportunity to file supplemental briefs on the issue whether respondent's conduct violated the narrowed canon.

[13] In light of our decision to remand for further proceedings, we do not address respondent's remaining arguments. Respondent may raise those arguments in a petition challenging the JTC recommendation on remand.

We remand this case to the Judicial Tenure Commission for further proceedings consistent with this opinion.

/s/ Maura D. Corrigan

/s/ Michael F. Cavanagh

/s/ Marilyn Kelly

/s/ Stephen J. Markman

/s/ Elizabeth A. Weaver

/s/ Clifford W. Taylor

/s/ Robert P. Young, Jr.

STATE OF MICHIGAN

IN THE SUPREME COURT

COMPLAINT AGAINST:

HON. JOHN M. CHMURA
Judge, 37th District Court
Warren, Michigan 48093

DOCKET NO.
FORMAL COMPLAINT
NO. 56

_____/

DECISION AND RECOMMENDATION FOR ORDER OF DISCIPLINE

At a session of the Michigan Judicial Tenure Commission held on the 2nd day of August, 1999, at which the following Commissioners were

PRESENT: Hon. Marianne O. Battani
Hon. William B. Murphy
Henry Baskin, Esq.
F. Philip Colista, Esq.
Hon. Theresa Doss
Hon. Barry M. Grant
Hon. M. Richard Knoblock
Joanne McPherson
James Mick Middaugh

I.

This judicial disciplinary proceeding primarily concerns certain campaign literature used by Respondent, Honorable John M. Chmura, a judge of the 37th District Court in Macomb County, during the 1996 election campaign. The formal complaint alleged that six campaign ads circulated by Respondent contained false, fraudulent,

deceptive and misleading statements, in violation of the Code of Judicial Conduct.

On May 28, 1998, the Michigan Supreme Court appointed the Honorable John R. Kirwan to serve as Master. Following the evidentiary hearing, as well as written and oral closing arguments, the Master submitted his report on April 12, 1999.

The Master found, among other things, that Canon 7B(1)(d) of the Code of Judicial Conduct is unconstitutional because of vagueness and overbreadth; and also, because it does not specifically provide that false, fraudulent, misleading or deceptive statements must be made with actual malice in order to constitute misconduct (MR 22). The Master further found that, if the Canon is constitutional and actual malice is required under the Canon, the proofs adduced at the hearing did not establish the requisite malice (MR 22-23). In the event that Canon 7B(1)(d) is constitutional and actual malice need not be proven, the Master concluded that portions of the campaign literature exemplified in Exhibit 3 (paragraph 7 of the Second Amended Complaint) and Exhibit 5 (paragraph 9 of the Second Amended Complaint) violated the Canon because the "average intelligent voter" would have been mislead by those exhibits (MR 23).

The Examiner filed written objections to the Master's Report and briefs in support of his objections. The Respondent filed a brief in support of the Master's findings and conclusions, except as to the Master's contingent findings on Exhibit 3 and Exhibit, 5, which Respondent asked that the Commission reject.

On June 14, 1999, the Commission heard oral argument on the Examiner's Objections to the Master's Report, as well as Respondent's argument in support of the Master's findings of fact and conclusions of law, and Respondent's Objections to the Report of the Master relating to Exhibits 3 and 5.

After careful consideration of the Master's Report, de novo review of the transcript of proceedings and exhibits, and review of the briefs filed by the Examiner and Respondent, and having heard oral argument, the Commission rejects the Master's Report in part and makes the following findings of fact and conclusions of law as the bases for its Decision and Recommendation for Order of Discipline in this matter.*

II.

The Honorable Thomas Kennedy retired from the 37th District Court in early 1996, creating a vacancy on the court (TR 293). The 37th District Court covers the cities of Warren and Center Line. The several candidates for appointment to fill the position included James Conrad, the Magistrate and Court Administrator at the 37th District Court since 1989, and Respondent, who maintained a private law practice outside of the judicial district (Tr. 788-792).

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* We adopt the findings of fact and conclusions of law set forth in the Master's Report only as to those allegations of misconduct not addressed in this Decision and consequently they are dismissed.

Respondent was appointed by Governor John Engler to fill the vacancy on the 37th District Court in May, 1996. As a result of the timing of the appointment, Respondent was required to run in the 1996 general election and be elected in order to retain his judicial seat (Tr. 789-790). Respondent's opponent in the general election was James Conrad (Tr. 791). The electorate voted to retain Respondent in office.

Respondent regarded the City of Warren as an "extremely political town" and believed that its elected officials were "well-known" for a "brass knuckles" approach to politics (Ex 8; Tr. 71-72). He also viewed himself as an "outsider" in Warren politics (Tr. 68). Respondent's appointment to the bench of the 37th District Court was met with a "great deal of hostility" by the "political establishment" in Warren and by employees of the 37th District Court (Tr. 70).

Respondent knew the upcoming campaign to retain his judicial seat would be "difficult." (Ex. 8)

Respondent had been unsuccessful in two prior efforts to hold nonjudicial elected office in Macomb County. In 1990, he sought a seat on the Macomb County Board of Commissioners. Respondent then ran for a position in the Michigan State House in 1992 (Tr. 65-66). Bearing in mind his prior unsuccessful candidacies, Respondent was determined to do whatever he had to do in order to retain his judicial position (Tr. 861).

Respondent formed a campaign committee which was comprised of long-time associates and friends (Tr. 72). Attorney Dean Ausilio acted as Respondent's campaign manager/coordinator (Tr. 561). Attorney Robert

Huth served as campaign treasurer (Tr. 1877). Joseph Munem served as an unpaid political consultant (Tr. 1562). Respondent also retained the services of Michael Greiner, then on the staff of the Mayor of Warren, as his paid political consultant (Tr. 1408-1409). Mr. Greiner developed the concepts of the various ads at issue, and wrote and designed Exhibits 1, 2, 3, 5 and 6 (Tr. 1414). Assistant Warren City Attorney Ronald Papandrea also assisted Respondent's campaign by reviewing court files to obtain data for inclusion in Respondent's campaign literature.

Respondent had considerable personal knowledge as to whether most of the statements in his campaign literature were accurate, truthful and not misleading. Where he was lacking such personal knowledge, the truth or falsity of the statements could be readily established, generally by a review of public records. Respondent personally reviewed and expressly approved the contents of all campaign literature prior to the printing of the ads and their distribution to the public (Tr. 1454). Respondent acknowledged it was his responsibility to insure that statements in the literature were true (Tr. 134, 136-137). Respondent also conceded that, even though he could delegate responsibility in the campaign, he retained the ultimate responsibility for compliance with the dictates of Canon 7 of the Code of Judicial Conduct (Tr. 695)

Respondent has consistently maintained that his ads are accurate, truthful and not misleading (Tr. 573-574) He maintained this posture throughout the hearing, even after having reviewed the admitted exhibits and having

heard testimony of other witnesses (Tr. 697-698). Respondent continues to claim there is nothing ethically improper about his campaign materials.

The question before the Master, as well as this Commission, and eventually the Michigan Supreme Court, is the propriety of the campaign ads used by Respondent, which were admitted in evidence as Exhibits 1-6, at the hearing, in light of Canon 7B(1)(d) of the Code of Judicial Conduct. The constitutional validity and meaning of Canon 7B(1)(d) are also very much at issue. Canon 7B(1)(d) provides:

> (1) a candidate, including an incumbent judge, for a judicial office:
>
> * * *
>
> (d) should not use or participate in the use of any form of public communication that the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading, or which is likely to create an unjustified expectation about results the candidate can achieve.

III.

A. "ROBIN HOOD" AD – EXHIBIT 1 (PARAGRAPHS 4-5)

Background

In 1991, the Michigan Legislature adopted legislation formally known as Property Tax Base Sharing, MCL 380.751, *et seq*, which was referred to by some individuals as "Robin Hood legislation." The legislation was part of an effort to reform school financing. It sought to correct disparities in spending per pupil resulting from a variance in the property tax base in Michigan school districts (Tr. 218-219). The act divided the state by counties into two regions. A particular school district fell into Region 1 or Region 2 depending on the county in who it was situated. (MCL 380.751 (h) and (i); TR 220. Region 1 included both the Center Line and Warren School Districts, and the rest of Macomb County. Region 2 included the City of Detroit School District and the rest of Wayne County. Within each region there were "in-formula" and "out-of-formula" school districts. The "out-of-formula" school districts were those which had higher property tax revenues than mandated by minimum funding levels. Property Tax Base Sharing would have required that they share a portion of their milage revenue with the less affluent or "in-formula" school districts in their own region. The captured funds were to be paid to a regional controller by the "out-of-formula" school districts, who would redistribute the funds to "in-formula" school districts in that particular region.

In November of 1991, Respondent filed a lawsuit in the Macomb County Circuit Court as counsel on behalf of

the Macomb County Taxpayers Association and certain individuals (Ex. 16). The suit challenged the constitutionality of Property Tax Base Sharing and named certain Macomb County school districts as defendants. The state intervened.

On November 13, 1991, the Honorable Robert Chrzanowski granted Respondent's clients' request for a preliminary injunction. The injunction restrained the defendant school districts from making payments and prevented the distribution of funds under the Act. The school districts put the disputed moneys into an escrow account (Tr. 225). The Honorable Lido Bucci, successor trial judge in the case, issued an opinion, on November 25, 1992, finding Property Tax Base Sharing unconstitutional.

The matter was appealed by the state. During the pendency of that appeal in the Court of Appeals, the legislature repealed the Tax Base Sharing legislation (Tr. 218). The funds held in escrow were then returned to the school districts from which the moneys had been collected. (Tr. 225-226)

The Literature

Exhibit 1 is a campaign ad depicting former Detroit Mayor Coleman Young as a Robin Hood like character carrying a sack of money. The ad states "Coleman Young and the Lansing crowd cooked up a plan" to take tax dollars of Warren and Center Line property owners and spend them on the Detroit School system. It further asserts that, under the "Robin Hood Legislation," Coleman Young and the same "Lansing crowd" stole from

local taxpayers and their children "to help prop up Coleman Young." Respondent is described as "standing up" to Coleman Young and taking the state to court, "arguing one appeal after another until the state backed down and allowed *your* kids to benefit from *your* hard earned tax dollars."

As noted, Property Tax Base Sharing sought to equalize substantial disparities in financing between different school districts within the State of Michigan. There was no credible evidence that Coleman Young, with or without the help of others from Lansing, planned, drafted or even actively supported the measure. It received considerable support from rural "at risk" school districts (Tr. 1109).

For purposes of this legislation, the State was divided by counties into regions. The revenue shifting would have been accomplished by requiring that out-of-formula school districts pay a certain portion of their revenues to a regional controller, who would redistribute those funds to in-formula districts within the same region (Tr. 219) Macomb County was in Region 1 and that region therefore included both the Center Line and Warren School Districts. The City of Detroit School District and the rest of Wayne County were in Region 2. Accordingly, Respondent's campaign ad falsely claimed that he prevented Coleman Young and others from taking tax dollars from Warren and Center Line property owners to spend on the Detroit school system.

Respondent filed a suit on behalf of certain individuals and the Macomb County Taxpayers Association,

against certain Macomb County school districts challenging the legislation. Respondent was not a party but merely acted as counsel for the plaintiffs. Neither Coleman Young nor the City of Detroit School District was named as a party. While the case was pending on appeal, the state legislature repealed the Property Tax-Base Sharing Legislation. Thus Respondent's claim that he stood up to Coleman Young in connection with the legislation was false.

Respondent also did not take the state to court or "argue" one appeal after another. The state intervened in the case filed by Respondent. In large measure, Respondent's activities in the litigation were in the trial court. There is no evidence the State "backed down" because Respondent filed suit on behalf of his clients. We find no provable connection between the commencement of the lawsuit and the legislative repeal of Property Tax Base Sharing.

Respondent also falsely claimed that Mayor Young and the "Lansing crowd . . . stole from our taxpayers, our schools and our children to help prop up Coleman Young." As noted above, and as Respondent knew from his involvement in the litigation, the Warren and Center Line Districts, located in Region 1, based on their location, would not have been required to share revenues with the City of Detroit School District or any school district in Region 2. Moreover, as a result of the repeal, no funds were ever shifted. Moneys paid to the regional controller prior to the repeal were placed in escrow and, upon repeal, returned to the out-of-formula districts. Under the circumstances, we conclude that Respondent's use of "buzz words" such as "stole," had no purpose

other than to mislead the public in a prejudicial manner and therefore was inappropriate and constitutes misconduct.

The Commission specifically rejects as unmeritorious various contingent interpretations of Tax Base Sharing advanced by Respondent. The claim by Respondent that the "ultimate aim" of supporters of Tax Base Sharing was that money would go from the Warren School District to Detroit is entirely speculative and not contemplated by the particular legislation (Tr. 105). We find equally unavailing Respondent's argument that MCL 380.752(3) of the Tax Base Sharing legislation would *eventually* have required that monies be paid to the City of Detroit schools by the Warren School District (Tr. 1701-1703). This was subject to a number of conditions precedent, none of which were certain to occur. Respondent failed to produce credible evidence that these conditions precedent were even likely to occur and because of the legislative repeal of the Act any evidence on this issue would be highly speculative.

As no property tax funds were transferred from the Warren or Center Line School Districts to the City of Detroit School District, there was no justifiable or reasonable explanation for using the caricature of Mayor Young as a Robin Hood character carrying a sack of money. We find Respondent used the caricature to appeal to racist attitudes among the electorate. The obvious racial implication of this ad was confirmed by the testimony of Chief Judge Dawn Gruenburg. Judge Gruenburg testified credibly that she had a conversation with Respondent contemporaneous with the circulation of Exhibit 1 to the public. She pointed out the racist theme of the ad. Respondent

replied that "it works." (Tr. 1108-1110). Respondent's determination to do what it took to win the election was further evidenced in his statements to Magistrate Conrad (Tr. 861) and his communications to the Commission concerning this matter (Exhibit 8).

Respondent had first-hand knowledge about the provisions in the Property Tax Base Sharing legislation because of his involvement with the litigation concerning its constitutionality. As with all the other ads, he also discussed this particular ad with members of his campaign committee and approved the specific design and language in Exhibit 1 before the piece was printed and distributed.

We find that each and every material allegation in paragraphs 4 and 5 of the Second Amended Complaint regarding Exhibit 1 has been proven and that Respondent used Exhibit 1 as a public communication in his campaign knowing that the statements contained therein were false, fraudulent, misleading and deceptive.

B. "IT DIDN'T HAVE TO BE THIS WAY" AD – EXHIBIT 3 (PARAGRAPH 7)

Exhibit 3 is a campaign ad which speaks of "Murder . . . Rape . . . Dismemberment . . . Innocent Victims . . . " and raised the question, "could Jim Conrad's court have stopped it?" It refers to criminal cases involving James Craig Cristini, as a defendant, and described him as a repeat offender; stated that Mr. Cristini was let back on the streets for only $100 after being charged with assault and battery; alleged that Mr. Cristini subsequently went on a "rampage of murder and mayhem;" and asserted

that this is what happens "when you put bureaucrats in charge of a court." The ad further asserts that Jim Conrad "is just a bureaucrat." As noted by the Master, the purpose of this ad was to criticize some decisions of the 37th District Court and to attach blame for those decisions to James Conrad, Respondent's electoral opponent (MR 12), even though the decisions in question were not made by Mr. Conrad.

Respondent took the position that he was entitled to hold Mr. Conrad responsible for the judicial decisions by others at the Court, because Conrad's literature held Conrad out as responsible for all judicial decisions at the Court. We have carefully reviewed the testimony of Respondent and Michael Greiner, Respondent's paid political consultant, who was responsible for the design of this ad (Tr. 1414), on this subject and reviewed Mr. Conrad's campaign literature. There is no credible evidence Mr. Conrad took credit for decisions made by the judges of the 37th District Court. Moreover, the Commission takes judicial notice, and finds based also on the unimpeached testimony of Chief Judge Dawnn Gruenburg (Tr. 1103) and former 37th District Court Judge Thomas Kennedy (Tr. 492-493, 495, 497), that Magistrate Conrad lacked authority to review, reverse, or in any way exercise. oversight over decisions by judges of that Court. The decisions by judges of the 37th District Court were their own responsibility, not Magistrate Conrad's. Finally, even if Conrad had overstated his authority or accomplishments, Respondent would not have a license to use false, fraudulent, misleading or deceptive literature in response.

Respondent's use of campaign literature to personally blame James Conrad for the 37th District Court's handling of cases in which Mr. Conrad had no involvement was improper. Additionally, we find improper the references in Exhibit 3 to James Craig Cristini being "let back out for only $100," when Mr. Conrad not only did not have anything to do with that particular case, but Cristini's release on the occasion in question was mandated by the interim bond statute, MCL 780.581 and MCL 780.582. Once Mr. Cristmi posted bond with the police authority, he was entitled to release without any involvement by Mr. Conrad or any of the judges of the 37th District Court.

Respondent had personal knowledge of Mr. Conrad's duties as a parttime magistrate and was aware that Mr. Conrad could not modify or overrule or set aide decisions of judges at the 37th District Court. He also knew that Mr. Conrad had never claimed ultimate responsibility for decisions or actions of the judges at the Court.

We find that each and every material allegation in paragraph 7 of the Second Amended Complaint regarding Exhibit 3 has been proven and that Respondent used Exhibit 3 as a public communication in his campaign knowing that the statements contained therein were false, fraudulent, misleading and deceptive.

C. "WE SHOULDN'T HAVE TO WORRY ABOUT SEXUAL HARASSMENT AT WORK OR VIOLENCE AT HOME!" EXHIBIT 4 (PARAGRAPH 8)

Exhibit 4 was created by Joseph Munem, Respondent's unpaid political consultant (Tr. 1562). The ad

focused on sexual harassment at work, violence at home and a lawsuit filed by Carrie Meyer, a former employee of the 37th District Court, two years prior to her termination.

In 1993 Ms. Meyer filed suit in the Macomb County Circuit Court and, in a multi-count complaint, named as defendants the cities of Center Line and Warren, the 37th District Court, some individual employees of the City of Center Line and James Conrad, the Court Administrator and Magistrate at the 37th District Court. Count 1 of that complaint included an allegation of sexual discrimination and sexual harassment in violation of the Elliott-Larsen Civil Rights Act.

The front of Exhibit 4 states: "We shouldn't have to worry about sexual harassment at work or violence at home." An inner portion of the ad states: "Magistrate Jim Conrad is facing trial for sexual harassment of a female court employee . . . "

At the hearing, there was considerable evidence introduced regarding the *Meyer* lawsuit. The evidence establishes that on April 1, 1996, the Honorable Raymond Cashen issued an opinion and order granting partial summary disposition in favor of Mr. Conrad on all claims in the complaint except count 2, which alleged retaliation in violation of the Elliott-Larsen Civil Rights Act (Tr. 339-340; exhibit 34). Ms. Meyer moved for reconsideration of Judge Cashen's decision. She argued that the judge had incorrectly struck count 1 of the complaint alleging sexual harassment and discrimination (Ex 35). Judge Cashen authored an opinion and entered an order on May 3, 1996, denying reconsideration, noting that the

motion merely raised issues previously ruled on by the Court (Ex 36).

Dean Ausilio, Respondent's campaign manager testified that he had examined the *Meyer* court file in August, 1996, and that this persuaded him that the sexual harassment charge still remained as part of the retaliation count (Tr. 1597, 1600). He conveyed this view to Mr. Munem, who thereafter prepared the substantive portions of Exhibit 4.

A review of the pertinent documents in *Meyer*, which existed when Mr. Ausilio looked at the file, especially the opinions and orders of Judge Cashen, demonstrates clearly and unequivocally that no sexual harassment charge against Mr. Conrad remained once Judge Cashen had granted partial summary disposition in April, 1996. The subsequent rulings and statements in the case by the Honorable Pat Donofrio, Judge Cashen's judicial successor, while subsequent to Mr. Ausilio's review of the *Meyer* file, provide additional convincing proof that no charge of sexual harassment survived dismissal of count 1 of the *Meyer* complaint.

Further, we find that Exhibit 4 would be false, fraudulent, misleading and deceptive even if Mr. Conrad was facing trial on charges of sexual harassment, because of the portrayal of the nature of the harassment. The face of the ad has a photograph of a woman sitting at a typewriter who is pulling back from unconsented touching by an unidentified male person. The caption on the ad speaks about not having to worry about sexual harassment at work or violence at home. The inner portion of the exhibit refers to Magistrate Jim Conrad facing trial for

sexual harassment of a female court employee. There is also a photograph of Mr. Conrad and another woman with her head on his shoulder, who was stated to be a former court reporter. The totality of the text, pictures and captions falsely implies that James Conrad is facing a charge of sexual harassment at the court involving unwanted physical contact with a female court employee. There was no evidence suggesting that Mr. Conrad was ever accused of such conduct. In fact, counsel for Ms. Meyer testified that there was no allegation Mr. Conrad improperly touched Ms. Meyer or engaged in improper physical contact (Tr. 1832).

Next, the Commission finds that Exhibit 4 falsely stated that Magistrate Conrad was accused of firing a female court employee after she complained about being harassed at work. Even a cursory reading of the *Meyer* complaint would reveal that it does not allege that Mr. Conrad fired Ms. Meyer from her position at the 37th District Court (Ex 26). It is uncontroverted that Ms. Meyer was still employed at the court when her complaint was filed in 1993 (Tr. 1832). She was fired by the four judges of the 37th District Court on August 4, 1995 (Tr. 508-509; Ex 28 S). It was further agreed by everyone, including Respondent, that Mr. Conrad lacked the authority to hire or firecourt employees (Tr. 506; 783-784; 670).

Exhibit 4 contains a dated photograph of a woman leaning her head on Mr. Conrad's shoulder. The picture of the woman was deliberately blurred. She is described as a "former court reporter." The woman in question is Lisa Burgor, a free lance court reporter, who had never been a regular or part-time or temporary employee of the

37th District Court (Tr. 1114). She had only worked there a few times when hired on a private basis by attorneys to attend a creditor's examination at the court (Tr. 1348-1349; 1355-1356). The implication that Ms. Burgor was a former court reporter at the 37th District Court was deliberately false, fraudulent, deceptive and misleading. It appears that the picture and caption were utilized to suggest falsely that Mr. Burgor was Ms. Meyer, the former court employee who had filed suit.

The scope of the false, fraudulent, misleading and deceptive statements is no surprise given the approach of the ad's creator, Mr. Munem. Mr. Munem sought to justify his use of the photograph of Mr. Conrad and the woman who was stated to be "a former court reporter" on the ground that it showed Mr. Conrad "in his supervisory capacity as court administrator didn't use good judgement in dealing with a female subordinate." (Tr. 1574). The photograph and captions, in fact, truly demonstrate no such thing. Ms. Burgor was never an employee at the 37th District Court and the complaint in the *Meyer* suit never alleged sexual harassment involving impermissible physical touching. Mr. Munem consciously sought to bolster the believability of the misrepresented allegations concerning the *Meyer* case through the use of misleading pictures, which had nothing to do with matters involved in the complaint; complete fabrications (e.g. Conrad had been accused of firing Ms. Meyer in retaliation after she complained of harassment); and by describing Ms. Meyer as a "victim" suggesting that her claims had merit.

Respondent personally approved Exhibit 4 before it was publicly circulated, as he did in the case of all the political advertisements at issue. He acknowledged that

Mr. Conrad lacked authority to hire and fire court employees. This put him on notice about the untruthfulness of the statement in the ad concerning Ms. Meyer's termination. Respondent also sat in on judges' meetings in which the *Meyer* Circuit Court case and a separate compensation claim filed by Ms. Meyers were discussed (Tr. 1120-1121). Further, Respondent had the opportunity to speak with counsel representing the Court in those matters. Respondent could have also questioned court employees about Ms. Meyer and her conduct while an employee. He explored none of these avenues for information concerning Ms. Meyer, the lawsuit, or the allegations against Mr. Conrad. We find this course of conduct to be willful, deliberate and calculated to ignore information which would contravene statements Respondent wanted to make in his campaign materials.

We find that each and every material allegation in paragraph 8 of the Second Amended Complaint regarding Exhibit 4 has been proven and that Respondent used Exhibit 4 as a public communication in his campaign knowing that the statements contained therein were false, fraudulent, misleading and deceptive.

D. "WHERE IS MY COURTROOM?" AD – EXHIBIT 5 (PARAGRAPH 91)

Exhibit 5 questioned what Jim Conrad had been doing as Court Administrator during the past seven years. It then made references to the cases of James Craig Cristini (subsequently convicted of murder) and Edward Lightfoot (subsequently convicted of felony stalking offenses), and attempted to hold Mr. Conrad responsible

for felonies committed by these individuals after they had appeared on misdemeanor charges in the 37th District Court.

Mr. Conrad had limited involvement with both of these individuals. He dismissed a misdemeanor charge at the request of the Warren City Attorney when Mr. Cristini was already serving a sentence on a felony conviction and awaiting trial on a murder charge on which he was ultimately convicted. Cristini was never released from custody after Conrad dismissed the misdemeanor (Ex. 21; Ex. 23; Tr. 754, 757-758, 814). In one case involving Mr. Lightfoot, Magistrate Conrad set a reasonable bond of $3,500 on a misdemeanor charge, which the defendant posted.

The various other cases referred to by Respondent in this ad involving either Mr. Cristini or Mr. Lightfoot were handled by judges at the 37th District Court. Mr. Conrad could not control what the judges at the court did and could not review or reverse a judge's decision (Tr. 1103; 492-493, 495). Respondent was aware of Mr. Conrad's limited authority as Magistrate and Court Administrator.

Respondent's attempts to hold Mr. Conrad responsible for decisions in these cases made by judges of the 37th District Court finds no support. Mr. Conrad's advertisements never claimed responsibility for all judicial decisions at the court. The references to *Cristini* and *Lightfoot* in Respondent's ads were mere pretext which had as their purpose publicly prejudicing Mr. Conrad concerning cases in-which he had no responsibility.

Exhibit 5 also referred to federal investigators "looking into charges" that employees of the 37th District

Court Probation Department were receiving kickbacks. The ad tried to place responsibility for such alleged corrupt activities on Mr. Conrad as Court Administrator.

The implication that there was an on-going investigation into alleged corrupt practices by Probation Department employees at the court also finds no support in the record. Both Mr. Conrad and Chief Judge Gruenburg credibly testified that any such investigation had been limited to one former employee of the Probation Department, who left the court well before the 1996 election campaign, and did not include other persons as claimed by the ad (Tr. 852-855; 1123). It was also established that Mr. Conrad, as Court Administrator, had no control over Probation Department employees and that their hiring, disciplining and firing could only be done by the judges at the court (Tr. 783-785; 1125). Respondent was aware of the limits on Mr. Conrad's authority over the Probation Department and could not reasonably authorize ads which tried to hold Mr. Conrad responsible for conduct of the employees of that department.

This advertisement also made several improper statements relating to the Carrie Meyer case. It flatly claimed that James Conrad had threatened Ms. Meyer's job, demoted and harassed her. Respondent could not reasonably treat mere allegations as established facts, especially because the allegations had been denied by Mr. Conrad.

Exhibit 5 made the unwarranted claim that Mr. Conrad's actions resulted in a major sexual harassment lawsuit. We need hardly note that upon payment of the filing fee anyone can file a lawsuit and make allegations at will. The filing of the suit by Ms. Meyer did not mean that Mr.

Conrad had done anything improper to justify a claim or that his conduct had caused the filing of the suit. All but one of the counts in the *Meyer* complaint were dismissed prior to trial and before Respondent's ads were developed and disseminated to the public. Mr. Conrad also ultimately prevailed before a jury on the one remaining count. All of the above strongly argues that Mr. Conrad's conduct was not the cause of the suit as claimed by Respondent.

The ad also asserted that Mr. Conrad's defense to the suit was that he couldn't be prosecuted because of government immunity. We find this statement was made to imply falsely that Mr. Conrad had no factual or legal defenses other than that of government immunity, when he had raised various other defenses (Ex 27).

We find that each and every material allegation in paragraph 9 of the Second Amended Complaint regarding Exhibit 5 has been proven and that Respondent used Exhibit 5 as a public communication in his campaign knowing that the statements contained therein were false, fraudulent, misleading and deceptive.

IV

The Michigan Supreme Court has stated that judges are held to the "highest standards of personal and professional conduct." *Matter of Bennett*, 403 Mich 178, 193 (1978). Canon 2A of the Code of Judicial Conduct gives further expression to this notion by stating that judges must accept restrictions on their conduct that would be considered burdensome by the general public.

Canon 7B(1) of the Code of Judicial Conduct sets forth limits on campaign conduct. Particularly relevant to the present matter is 7B(1)(d), which proscribes a judge's use of campaign ads which are false, fraudulent, misleading, deceptive or which contain a material misrepresentations of fact or law.

As a threshold proposition, we find that at the time of the campaign Respondent was aware of the obligations imposed by Canon 7 (Tr. 77) and is accountable for the contents of his campaign ads. At the hearing before the Master, Respondent personally acknowledged his responsibility for the ads (Tr. 134, 136-137, 695). The present claim that Respondent relied on others to assist him in formulating the ads in question is no defense. In rejecting this argument, it has been stated that a respondent judge must "take the credit or blame for his actions as a candidate for judicial office." *In re Hildebrandt* 675 NE2d 889, 894 (Ohio, 1997). In this regard, it is significant that Respondent reviewed each piece of literature and gave his express approval before the item was printed and circulated to the public (Tr. 1454).

Respondent has raised a number of defenses or objections to the charges of misconduct. These include claims that the ads are "true" or at least "substantially correct;" that no authority has been cited holding a judge responsible for "misrepresentations" as distinct from outright falsehoods; and that Respondent's campaign ads were justified by statements made in Mr. Conrad's ads.

We agree with the comments of the Court in *In re Baker*, 542 P2nd 701, 713 (Kan. 1975):

> * * * unless the election is to be a pure popularity contest based on name recognition alone, the only legitimate area for debate is the relative qualifications of the candidates. In our view the health, work habits, experience and ability of the candidates are all matters of legitimate concern to the electorate who must make the choice.

While these matters are fair game, statements concerning them must be accurate. *Baker supra,* at 706. In *Baker,* the judicial challenger circulated a post card which falsely stated that the incumbent office holder would not be badly harmed if defeated, since he qualified for disability retirement and a substantial pension. While the challenger was unaware these statements were not true, the Kansas Supreme Court found he did "misrepresent" a fact, contrary to Canon 7B(1)(d) of the Code of Judicial Conduct and imposed a sanction. The *Baker* case implicitly recognized that the candidate or the candidate's campaign committee was obligated to verify information about the opponent and failed to do so. In the same manner, we hold Respondent was obligated to verify the correctness of information about Mr. Conrad and any failure or willful refusal to do so is no excuse.

Respondent's conduct also bears a striking resemblance to that found in *In re Hildebrandt,* 675 NE2d 889 (Ohio, 1997). There, an incumbent judge ran radio and TV ads stating that the judge's opponent, when in the United States Congress, had voted against the death penalty. Judge Hildebrandt's statement was incorrect and the Ohio Commission of Judges found that the judge had made an argument "without presenting the underlying

facts to the public thereby misleading the public." 675 NE2nd at 894. The opinion further stated:

> There can be no doubt that withholding information in a judicial campaign to explain the reason for a negative statement about another misleads the public and lessens the confidence in the judiciary.

In common with Judge Hildebrandt, Respondent's campaign materials contain outright misstatements of fact, as well as statements which created an erroneous, misleading impression, because Respondent deliberately chose to withhold clarifying information from the public which would have made the information given not false or misleading. See also *Summe v Judicial Retirement & Removal Commission*, 947 SW2d 42 (Ky. 1997)

At times, Respondent has advanced the novel position that, if his campaign ads were not in fact true they were at least "substantially correct," or close enough to the truth. The Master, for reasons which are unclear, applied this nebulous standard to some of his findings, when he concluded that certain matters were "substantially true" or not "substantially misleading" (MR 10, 11).

In re Judicial Campaign Against Kienzle 708 NE2d 800(Ohio, 1999), effectively refutes this position. In *Kienzle*, a judicial candidate's campaign literature stated that "[a]s judge, Robert Brown imposed $430,000 in taxes on Wayne Countians. The Court of Appeals said he was wrong." Much in the manner of Judge Chmura, the Respondent in *Kienzle* sought to justify his campaign statement on the basis that his judicial opponent's ruling

in a certain case was "functionally equivalent" to imposing a tax and that he had no intention to violate Canon 7 of the Code of Judicial Conduct. The court in Kienzle rejected this argument stating:

> The respondent has been a licensed attorney since 1974 and has served as a common pleas court magistrate since 1991. Given his educational and professional background and the fact that he was seeking election to a judicial office, the respondent knew or should have known that members of the judicial branch of government are without power to impose taxes. This is a fundamental principle of our form of government recognized by the drafters of the United States Constitution (See Federalist No., 48 by James Madison and Federalist No. 78 by Alexander Hamilton) and contained throughout the Ohio Constitution and Revised Code. Accordingly, we find clear and convincing evidence that the respondent's statements were made either knowing them to be false or with a reckless disregard of the truth.
>
> * * *
>
> *To argue that the complainant's order and the subsequent reversal by the court of appeals is functionally equivalent to the illegal imposition of a tax is disingenuous and clearly beyond the bounds of campaign conduct permitted by Canon 7.*
>
> * * *
>
> . . . the respondent's statement not only was inaccurate but promotes the public's misunderstanding of the role of the judiciary in our form of government. 708 NE2d at 801 – 802. (emphasis added)

In the Matter of Johnson, 729 P2d 1175, 1180 (Kan. 1986) criticized the use of a "half truth" by an incumbent county attorney during his bid for reelection. The incumbent stated his opponent had recommended abolition of a city ordinance dealing with drunk driving. While the statement was true, the Kansas Supreme Court described it as a "half-truth" because the recommendation to abolish the law was based on the fact that the state legislature had invalidated the ordinance. The incumbent had implied his opponent had a different purpose in mind when making the recommendation. The omission of this qualifying information was held to make the statement "false" and to constitute conduct prejudicial to the administration of justice (729 P2d at 1181).

We also find without merit the claim of Respondent that his campaign ads were a justified reply to the campaign of James Conrad. In the final analysis, even if the magistrate's ads were improper in some respect, the fact of misconduct by another judicial candidate would not justify ethically improper campaign conduct by-Respondent. See *In re Diener*, 268 Md 659, 304 A2d 587, 594 (1973).

V

We agree with the argument and conclusion of the Examiner, set forth in his Brief in Support of Examiner's Objections to the Report of the Master, that Canon 7B(1)(d) of the Code of Judicial Conduct is not violative of the First Amendment and is enforceable against Respondent.

Less than four years ago, the Michigan Supreme Court adopted Canon 7B(1)(d), prohibiting judicial campaign ads that were "false, fraudulent, deceptive and misleading." The provision was originally proposed by a committee of the State Bar and its consideration and adoption by the Court followed the usual detailed procedure, including publication for comment.

The rationale for Canon 7B(1)(d) is obvious. We quote with approval from the Examiner's Brief:

> In limiting judicial campaign speech, MCJC 7B(1)(d) goes directly to the heart of the judicial function and focuses precisely on the role a judge assumes in the adjudication of cases. Judges decide cases based upon testimony and affidavits from witnesses, each of whom is sworn to tell the truth. Judges evaluate the credibility of each witness and adjudicate perjury. Judges are entitled to affirmative candor from lawyers, even when such truth may be against the, interests of the lawyers' clients. Judges hold contempt power, a tool that is most often used when the judge believes a party, attorney, or witness has not been candid with the court. A judge's ability to dispense justice depends upon the judge's ability to discern evasion, dissembling, lack of candor, incomplete facts, and outright lies. Judges perform this function not occasionally, but in virtually every proceeding before their courts. Without public confidence in the judiciary's willingness and ability to do so, the American system of justice would be on shaky ground.
>
> Given the role tha ' idges serve in the system of justice and the day to day official duties which judges must undertake, therefore, the judge's

own ability to adhere to standards of truthfulness becomes a crucial factor in public confidence in the judiciary. The public has the right to expect that judges themselves will not lie, will not shave the truth, and will not issue misleading statements. Most citizens only have an opportunity to view judges and to gauge this trait during campaign periods. If candidates engage in such activity to get into judicial office, the citizenry can have little confidence in the candidate's performance of judicial duties.

There can be fewer interests more compelling than to ensure that the gatekeepers of the forum where truth is weighed are themselves held to standards of truth-telling. Judicial candidates are distinguishable from other public officials, since those other officials are not called upon to evaluate veracity and credibility for the disputes of others, as are judges. Further, if, nonjudicial candidates lie, misrepresent, or mislead, they can be *taken before a judge* for a determination of the consequences. "Judges remain different from legislators and executive officials, even when all are elected, *in ways that bear on the strength of the state's interest* in restricting their freedom of speech." *Buckley v Illinois Judicial Inquiry Board*, 997 F2d 224, 228 (CA7 1993). (Emphasis added.) It was the judge in the Paula Jones case that had the final authority to tell President Clinton that his deposition answers were contemptuous and evasive. *Jones v Clinton*, 1999 WL 202909 (ED Ark 1999). What weight would such a judicial pronouncement have if the judge was not required to adhere to the conduct the judge must adjudicate?

We further adopt as our own this statement in the Examiner's Brief:

> Judges are held out to the public as evaluators of truth, veracity and credibility, and no one else in the justice system may be substituted to perform this function. The Michigan Supreme Court has an interest in preserving confidence in the judiciary, i.e. confidence in the judiciary's ability to hear evidence and to reach determinations on truth, veracity and credibility. Candidates who knowingly engage in "false, fraudulent, misleading and deceptive" communications to attain or retain judicial office erode confidence in the judiciary's ability and willingness to adjudicate those issues for society. A candidate's personal interest in getting elected at all costs, to the extent of engaging in "false, fraudulent, misleading and deceptive" communications, cannot override the need for public confidence in the integrity of the judiciary and the expectation that the candidate be held to the standards the judge will be applying to others while in judicial office.
>
> A rejection of MCJC 7B(1)(d) signals to the public that an individual candidate's right to misrepresent, defraud, deceive, and mislead voters in an attempt to attain or retain judicial office is a higher interest than ensuring confidence in a judiciary by demanding candidate communications that are not knowingly false, fraudulent, deceptive or misleading.

We reject the conclusion of the Master that Canon 7B(1)(d) is overbroad. We find it to be drawn with sufficient precision.

The canon comes into play only when a judicial candidate has knowledge a communication is false, fraudulent, misleading or deceptive. Its application is further limited by the requirement that the misrepresentation be material. The provision does not inhibit candidates from offering opinions; however, such opinion cannot knowingly misrepresent. It has no impact on truthful communications.

The standard is a long-standing one adapted by the United States Supreme Court. The Respondent's claim of it being void for vagueness does not merit serious consideration. We have reviewed the cases relied on by the Master and cited by Respondent. In no instance do these cases hold unconstitutional a provision prohibiting "false, fraudulent, deceptive or misleading" political speech by judges.

McIntyre v Ohio Elections Commission, 514 US 334 (1995), dealt with a state statute prohibiting distribution of anonymous campaign literature. The interest of the state was described as "preventing fraudulent and libelous statements and in providing the electorate with relevant information." While the statute was invalidated, the Supreme Court recognized the state could utilize other statutes designed to prevent misleading campaign statements. The Court stated:

> The state interest in preventing fraud and libel stands on a different footing. We agree with Ohio's submission that this interest carries special weight during election campaigns when *false statements*, if credited, may have serious adverse consequences for the public at large.98 514 US 334, 350. (emphasis added).

McIntyre recognized that states have leeway to regulate misleading statements made in a campaign. Canon 7B (1)(d) does so in recognition of the compelling interest in electing a judiciary which adheres to standards of truthfulness, veracity and credibility.

Our review of case authority leaves us uncertain about the applicability of the *New York Times v Sullivan*, 376 US 254 (1964), standard of "actual malice" to judicial disciplinary matters. In the event this standard applies, we find and conclude that Respondent acted with "actual malice" in utilizing the campaign ads in question. His "calculated falsehood" satisfied the *New York Times* standard.

VI

In arriving at our decision, the Commission has viewed Exhibits 1-6 individually and collectively, as well as the other relevant evidence. We wish to make it clear that the Commission would not be inclined to find misconduct on the basis of an insignificant isolated campaign statement or understandable inadvertence on the part of a campaigner. Here, we are persuaded that Respondent's campaign literature, individually and as a whole, reveals beyond any reasonable doubt a conscious effort to use false, fraudulent, misleading and deceptive statements as part and parcel of his campaign strategy. The materials themselves speak eloquently to this point, as they cover a broad spectrum of issues and are consistently untruthful. Additionally, we note Respondent's own statements about regarding himself as an outsider faced with a hostile environment at the 37th District Court. Respondent

had also experienced two unsuccessful bids for non judicial office. As a result of such considerations, we find that Respondent decided to wage a "brass knuckles" campaign and followed through on that strategy in successfully retaining his judicial position.

Respondent's campaign exacted a toll on many individuals and situations. It doubtless had a negative impact on his opponent, the other court employees, and the 37th District Court environment. It drew criticism from the President of the Macomb County Bar Association about "sleazy politics" and the "racial overtones" of certain of Respondent's ads (TR. 707, 709, 713). Both the Macomb County Bar Association and the State Bar of Michigan set up programs to monitor judicial campaigns and prevent the recurrence of activities characterized by Respondent's campaign. Respondent's campaign conduct did a grave disservice to maintaining respect for the judiciary; the very branch of government set up to search for truth and justice. Consequently, we must conclude that Respondent's conduct constitutes misconduct in office, and conduct clearly prejudicial to the administration of justice, and warrants discipline by the Michigan Supreme Court.

WHEREFORE, upon resolution of the Michigan Judicial Tenure Commission, it is recommended that the Michigan Supreme Court enter an order suspending the

Honorable John M. Chmura from the performance of all judicial duties without pay for a period of 90 days.

STATE OF MICHIGAN
JUDICIAL TENURE COMMISSION

/s/ Marianne O. Battani
HON. MARIANNE O. BATTANI
CHAIRPERSON

/s/ William B. Murphy/WSB
HON. WILLIAM B. MURPHY
VICE CHAIRPERSON

/s/ Henry Baskin
HENRY BASKIN, ESQ.

/s/ F. Philip Colista
F. PHILIP COLISTA, ESQ.

/s/ Theresa Doss/WSB
HON. THERESA DOSS

/s/ Richard Knoblock
HON. M. RICHARD KNOBLOCK

CONCURRING OPINION

Seven members of the Judicial Tenure Commission have decided that the Respondent in this case committed misconduct in order to achieve success at the ballot box.

Judicial campaigns are becoming more vicious, deceptive and are appealing to the voters' worst instincts, prejudices and biases. Historically, judges have earned the respect of the communities in our country. People respected the judiciary and judicial elections were not composed of deceptive advertising, name-calling or

attempts to inflame the prejudices or biases of the electors. Rather, candidates were expected to seek judicial office in a dignified manner based upon judicial qualifications. This case is a demonstration of a candidate who was not as concerned with qualifications as much as an attempt to gain a political advantage through the use of deception and misleading campaign slogans, as well as to appeal to the emotions of the voters. If judges are to regain and maintain respect in our society, judicial elections must not be based upon the type of misconduct that was found by the Commission. There is no place in judicial elections for deceptive advertising or any appeal to prejudice or bias. If people are to respect the courts, they must begin at the time the person is running for the judgeship, which should be conducted in a dignified electoral process. There should be no attempt to give the impression to the voter that the judicial candidate already has made up their mind as to possible issues that may come before him or her. Judicial elections are not legislative or executive contests wherein the voters have a right to know how the candidates stand on issues that will require their legislative vote or veto, otherwise judges would not have an open mind, or be willing to hear cases on their merits before rendering a decision. It is the responsibility of the Judicial Tenure Commission to make decisions that will enable judicial candidates to become good jurists, and to those who are already serving, to help them carry out their judicial duties in a dignified, intelligent and non-prejudicial and respectful manner. It is important that the high values of society are illustrated by judicial candidates who set a high standard in participating in the electoral process. All judges, both new and

established, must command the respect of the community, since judges are the persons in our country that have the ability to profoundly effect the rights of individual citizens, thus persons seeking judicial office should not use false advertising methods which forfeit the open-mindedness of a good and thoughtful judge.

/s/ Barry M. Grant/WSB
HON. BARRY M. GRANT

The following members dissent from the Decision and Recommendation for Order of Discipline:

/s/ Joanne McPherson/WSB
JOANNE MCPHERSON

/s/ James Mick Middaugh/WSB
JAMES MICK MIDDAUGH

STATE OF MICHIGAN

BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

HON. JOHN M. CHMURA
Judge, 37th District Court
Warren, Michigan 48093
_____/

FORMAL COMPLAINT NO. 56

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS.
COUNTY OF WAYNE)

BRIDGETTE A. FREEMAN, being first duly sworn, deposes and says that she is employed with the Judicial Tenure Commission and that on the 2nd day of August, 1999, she served upon:

Mr. Brian Einhorn
Attorney At Law
4000 Town Center, Suite 909
Southfield, Michigan 48075

A copy of the Judicial Tenure Commission's Decision and Recommendation for Order of Discipline and this Proof of Service, via facsimile transmission and first class mail.

Further, Affiant sayeth not.

/s/ Bridgette A. Freeman
BRIDGETTE A. FREEMAN

Subscribed and sworn to before me
this 2nd day of August, 1999.

/s/ Wilmar S. Bennett
WILMAR S. BENNETT
NOTARY PUBLIC,
WAYNE COUNTY, MI
My Commission Expires: July 15, 2002

WILMAR S. BENNETT
Notary Public, Wayne County, MI
My Commission Expires 07/15/2002

STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION

(Filed April 12, 1999)

COMPLAINT AGAINST:

HONORABLE
JOHN M. CHMURA
Judge, 37th District Court
Warren, Michigan 48093

Formal Complaint No. 56
John R. Kirwan

_____/

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THE MASTER'S REPORT INCLUDING FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This controversy arises from a complaint filed by the Judicial Tenure Commission ("JTC") against John M. Chmura, a judge of the 37th District Court of the State of Michigan. The JTC complains that the content of six pieces of campaign literature (Ex. 1-6 attached hereto),

which were approved and distributed by Judge Chmura and his campaign committee during his 1996 campaign for election to the 37th District Court, contained material that was false, deceptive and misleading, contrary to the provisions of 7(B)(1)(d) of the Judicial Canons of Ethics.

Judge Chmura denies these allegations. Furthermore, he claims that 7(B)(1)(D) is an unconstitutional restriction upon his freedom of speech rights for the reasons the canon is vague and overbroad. The issues having been joined, the Michigan Supreme Court appointed the undersigned as Master for the purpose of conducting an evidentiary hearing and thereafter making findings of fact and conclusions of law. An evidentiary hearing has been held, final oral arguments have been heard and written briefs have been submitted by both parties in support of their positions.

This opinion is divided into two parts. The first part pertains to the respondent's challenge to the constitutionality of 7(B)(1)(d) of the Judicial Canons of Ethics, and the second part encompasses findings of fact and conclusions of law relative to the claims made by the JTC against Judge Chmura.

I.

Canon 7(b)(1)(d) provides:

> B. Campaign Conduct.
>
> (1) A candidate, including an incumbent judge for a judicial office:
>
> (d) should not use or participate in the use of any form of public communication that the

> candidate knows is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading, or which is likely to create an unjustified expectation about results the candidate can achieve.

The Constitution of the United States, Amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The issue of whether or not language, such as that contained in 7(B)(1)(d) of the Judicial Canons of Ethics, offends the First Amendment to the U.S. Constitution has been the subject matter of several cases, both on the state and federal level. Many of these cases are in conflict, just as there existed disagreement in the testimony of the highly regarded scholars in constitutional law who testified on behalf of the JTC and the respondent at the evidentiary hearing.

In order to determine whether or not the language of the canon in question is violative of the First Amendment, it is first necessary to consider general principles of law, gleamed from the most persuasive cases that are relevant to this controversy and then apply those principles to the facts of this case.

An analysis of the cases suggests that while the state has the power to regulate the speech of judicial candidates, it does not have the power to forbid privileged speech allowable under the First Amendment. *Buckley* v *Illinois Judicial Inquiry Bd.* 987 F2d 224 (7th Cir 1993).

In *Ackerson* v *Kentucky Judicial Retention & Removal Com'n*, 776 F Supp 309, 313 (WD Ky 1993), the court held that the "permissibility of a state-imposed restriction on freedom of speech hinges upon whether a compelling state interest is demonstrated and whether means have been employed to narrowly draft the regulation so as to avoid unnecessary abridgment of constitutional rights." *Accord Stetton* v *Disciplinary Board of Supreme Court of Pennsylvania*, 944 F2d 137, 138 (3d Cir. 1991) Thus, a restriction on political speech must be justified by a compelling state interest and must be narrowly tailored to prohibit only that speech made with knowledge of its falsehood or with reckless disregard for its truth. *See New York Times* v *Sullivan*, 376 US 254, 84 S Ct 710 (1964).

In *Vanasco* v *Schwartry*, 401 F Supp 87, 92-93 (EDNY 1975) the court stated:

> It is important to emphasize here a proposition with which the Board agrees, i.e., that any state regulation of campaign speech must be premised on proof and application of a Times 'actual malice' standard. We are not dealing with defamation suits brought by 'private individuals' where a standard somewhat less than that required by Times would be appropriate. To the contrary, Board proceedings concern regulation of the speech of 'public officers' and 'public figures' during campaign for political office where the constitutional guarantee of freedom

> of speech 'has its fullest and most urgent application.' (internal citations omitted.)

The holding in *Vanasco* supports the proposition that Canon 7(B)(1)(d) is not so narrowly drafted as to avoid unnecessary abridgement of the constitutional right of free speech because there, the court found that language, similar to that contained in Canon 7(B)(1)(d), did not regulate only unprotected expression. Instead, the court found that the campaign regulations prohibiting *misrepresentations* of a candidate's qualifications, position on an issue, or party affiliations were unconstitutionally overbroad and vague on their face: "These sections cast a substantial chill on the expression of protected speech and are unconstitutionally overbroad and vague on their face." *Vanasco*, 401 F Supp at 94-95.

In *Brown* v *Hartlage*, 456 US 45, 46, 102 S Ct 1523 (1982), a case involving a challenge to the Kentucky Corrupt Practices Act, the Supreme Court affirmed:

> Of course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements. But "erroneous statement is inevitable in free debate and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' " . . . Although the state interest in protecting the political process from distortions caused by untrue and inaccurate speech is somewhat different from the state interest in protecting individuals from defamatory falsehoods, the principles underlying the First Amendment remain paramount. Whenever compatible with the underlying interests at stake, under the regime of that Amendment "we depend for. . . . correction not on the conscience

> of judges and juries but on the competition of other ideas." In a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent. The preferred First Amendment remedy of "more speech, not enforced silence," . . . thus has special force.
>
> [*Brown, supra* at 60-61 (quoting *New York Times Co.* v *Sullivan*, 376 U.S. 254, 271-272 (1964); *Gertz* v *Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974); and *Whitney* v *California*, 274 U.S. 357, 377 (1927) (Brandeis J., concurring)).]

In *Brown*, the Court held that there was no showing that the candidate made the disputed statement other than in good faith and without knowledge of its falsity or with reckless disregard of whether it was false or not.

Therefore, while it is true that the State of Michigan has a compelling state interest in overseeing and regulating judicial elections, nonetheless, any canon or rule that attempts to restrict campaign speech must be written so as to serve that interest in a manner that avoids an abridgement of a candidate's freedom of speech rights as defined by *NY Times* v *Sullivan*. While it is also true that Canon 7(B)(1)(d) prohibits false, fraudulent, misleading and deceptive communications knowingly made by a candidate, that is not enough to withstand a constitutional challenge. This is so because the language of the canon, considered in its entirety, is not sufficiently specific, as required by *NY Times, supra*, to clearly apprise judicial candidates as to what they can and cannot say. This results in a chilling impact on a candidate's freedom of speech rights. The words "misleading" and "deceptive" are particularly troubling. Does a judicial candidate

who uses a photograph of himself in his campaign literature that is ten years old violate the canon because it is deceptive or misleading? – or a photo that is five years old or two years old? Does the canon require that one who uses an old photograph to print a recent photo with the literature in order to conform to the canon? Examples such as this abound. Consequently, as any governmental restriction on political speech is suspect, and as it is this writer's opinion that Canon 7(B)(d) is vague and overbroad, the language of the canon in its present form is an abridgement of freedom of speech rights.

Conclusion

The JTC's complaint against Judge Chmura should be dismissed for the reason that the canon which he is charged with violating is unconstitutional on its face.

II.

This second part of the Report consists of Findings of Fact and Conclusions of Law. These Findings and Conclusions assume the constitutionality of Canon 7(B)(1)(d), contrary to the Master's conclusions expressed in Part I, and should be read in that light. It is necessary that these Findings and Conclusions be made so as to avoid a remand, in case the members of the Judicial Tenure Commission or the Michigan Supreme Court do not agree with the legal analysis and conclusions expressed in Part I. The principles of law that guided the undersigned in making his Findings and Conclusions will first be stated. The Findings of Fact and Conclusions of Law follow.

Principles Of Law

1. It is the function and obligation of the Master in these proceedings to conduct as evidentiary hearing relating to claims made by the JTC against Judge John M. Chmura and to make findings of fact and conclusions of law relating thereto.

2. In order for the JTC to sustain its burden of proof, it must establish by a preponderance of the evidence that Judge Chmura violated the Judicial Canons of Ethics.

3. While a judicial candidate's freedom of speech rights allow campaign literature that is aggressive, offensive, distasteful and controversial, it does not allow a candidate to make statements that are clearly untrue.

4. In interpreting whether or not campaign literature is deceptive or misleading, it must be tested in the context of whether or not the average intelligent voter would be misled by the literature.

5. As the words "misleading" and "deceptive" are vague and equivocal as used in the Canons of Ethics, they could be construed differently by the average intelligent voter. Consequently, these words should be construed in the context of whether or not the statement contained in the campaign literature is clearly untrue.

6. If campaign literature is composed in such a manner that suggests that if a candidate is elected, the electorate in some general way will benefit, such literature is essentially a statement of opinion and not violative of the canons.

7. Campaign literature that contains words such as "a tough judge" and "hard on criminals" are statements

of opinion and therefore not violative of the canons for the reason they do not suggest that the candidate will not follow the law in performing his or her duties and because the average intelligent voter would not be misled by such characterizations.

Findings Of Fact

1. That John M. Chmura was appointed a judge of the 37th Judicial District by Governor John Engler in April of 1996. The 37th Judicial District encompasses the cities of Warren and Centerline in the County of Macomb and is composed of four judges.

2. That Judge Chmura was required to run for election to the position he had been appointed in the general election of 1996. His opponent in that judicial race was James Conrad, a long-time employee of the 37th District who was serving at the time of the campaign and election as Magistrate and Court Administrator.

3. That Mr. Conrad, who had served the Court for some time, was highly regarded by both the judges and personnel of the Court who, for the most part, supported Mr. Conrad in his effort to unseat Judge Chmura.

4. That as a consequence, Judge Chmura and his campaign committee felt it was necessary to conduct a vigorous and aggressive campaign if Judge Chmura was to retain the judicial position.

5. That thereafter, members of Judge Chmura's campaign committee, but not Judge Chmura, prepared six campaign circulars for publication and distribution to the electorate.

6. That it was members of Judge Chmura's campaign committee and not Judge Chmura who investigated the background material that constituted the content of the six circulars.

7. That Judge Chmura did approve the circulars.

8. That the content of the six circulars which are attached as exhibits hereto are the basis of the JTC's claim that Judge Chmura violated the judicial Canons of Ethics.

9. That the following analysis of each exhibit contains a finding as to whether or not the exhibit violates the Judicial Canons and contains the rationale and support for the finding:

9(a). **Exhibit 1 – The Robin Hood Circular**

The obvious overall purpose of this circular is to portray Judge Chmura as one who had aggressively fought legislation that was designed to shift tax revenues away from wealthy school districts, such as the Warren-Centerline District, which was situated within the judicial district that Judge Chmura was seeking election, to school districts such as the City of Detroit, which were less affluent. The legislation was called by some "the Robin Hood legislation" because it sought to take revenue from wealthier districts and give it to poorer ones. While the legislation was not so designed that the City of Detroit School District would directly receive tax revenues from tax payers of the Warren-Centerline District, nonetheless, the legislation did have the effect of increasing revenues to the City of Detroit School District and reducing revenues to the Warren-Centerline District. There can be little doubt that Judge Chmura, prior to the

time he became a judge, vigorously challenged as a lawyer the so-called Robin Hood legislation. He commenced a lawsuit challenging the constitutionality of the Act and was involved in more than one appeal relating to this lawsuit. Surely, Judge Chmura had the right to inform the electorate of his aggressive challenge to this legislation, as long as the content of the literature was true and not misleading or deceptive. In this context, it is helpful to analyze each page to determine whether or not there exists a violation of the canons.

Page 1 of this four-page exhibit portrays Coleman Young, the former Mayor of the City of Detroit, with a bag of purported money over his shoulder and with the words "Robin Hood?" printed underneath. Viewed in the context of overall purpose of the exhibit, this page suggests that Mayor Young was advancing legislation that would bring added revenues to the City of Detroit School District at the expense of wealthier school districts. As it is not unlikely that Coleman Young would be supporting such legislation, a reasonable inference can be drawn that he did in fact support the legislation. Consequently, Page 1 does not send a false message.

The language of Page 2, viewed in the context of the entire exhibit, states that Judge Chmura "stood in the way" of the legislation presented by Mayor Young on behalf of the City of Detroit. As Judge Chmura did, in fact, challenge the Robin Hood legislation by pursuing court action to prevent its implementation, such characterization was not untrue or misleading.

While many would consider the language of Page 3 crude and excessive – "they stole from our taxpayers, our

schools and our children" – it is seriously doubted that the average intelligent voter reading the entire exhibit would view this language literally and be misled thereby. Rather, the average intelligent voter would readily recognize that the message being conveyed was that the City of Detroit was attempting to promote the so-called "Robin Hood" legislation and that Judge Chmura aggressively challenged that legislation by commencing a lawsuit to prevent its implementation. As this message was substantially true, the JTC has failed to prove that the content of page 3 was untrue or misleading.

As page 4 of the exhibit merely depicts a copy of a photograph of Judge Chmura and his family, as well as a list of organizations to which Judge Chmura belonged, there is no violation of the canon.

In regard to the allegation that the exhibit as a whole is racist, I find this claim totally unfounded. Mayor Young was portrayed as a representative of the City of Detroit, as he surely was. To infer racial motives from this alone would be wrong and most unfair to Judge Chmura and his campaign committee. As the evidentiary hearing failed to demonstrate that the actions of Judge Chmura and the members of his committee were in any way racially motivated, I find that the JTC has failed to prove this allegation.

Conclusion

The JTC has failed to prove by a preponderance of the evidence that exhibit 1 violated Canon 7 (B)(1)(d) of the Judicial Canons of Ethics and has failed to prove that

exhibit 1 was an attempt to influence the electorate by introducing race as an issue in the election.

9(b). **Exhibit 2 – "End of Fear –1"**

Exhibit 2 depicts a woman looking through the window of her home and the caption "END OF FEAR." The circular also proclaims that Judge Chmura is "one tough judge" and further discusses his role relating to the "Robin Hood" legislation.

Language in campaign literature which describes a judge as "one tough judge" is not a misstatement of fact. If Judge Chmura considers himself a tough judge, he may say so in his campaign literature. If his opponent believes he is not a tough judge, he or she can challenge that opinion in his or her campaign literature. As this is a matter of "opinion" and not a matter of "fact," it cannot be considered a misstatement of "fact." Furthermore, it is not likely that the average intelligent voter would be misled by such characterizations, nor do such characterizations imply that a candidate for judicial office will not follow the law in performing his duties as judge. Consequently, such statements of opinion do not violate the canons.

The JTC also objects to Judge Chmura's depiction of himself as having stood up to Coleman Young in the "Robin Hood" matter. Given the fact that the evidence established that Judge Chmura did challenge in court the Robin Hood legislation, was involved in appeals relating to this legislation, and was awarded substantial legal fees by the court for this involvement, Judge Chmura's characterization as having stood up to Mayor Young was neither false nor misleading. While it was true that this

legislation was not devised in such a manner that would take tax revenues directly from Warren-Centerline and give them to Detroit, nonetheless, it is necessary to look at the total picture in determining whether the circular was misleading. As the legislation was beneficial to the City of Detroit Schools and not the City of Warren-Centerline School District, the circular was not substantially misleading.

Conclusion

The JTC has failed to prove by a preponderance of the evidence that this exhibit violates the Judicial Canons of Ethics.

9(c). **Exhibit 3 "It Didn't Have To Be This Way"**

The overall purpose of this exhibit is to criticize certain decisions of the 37th District Court and to attach responsibility for those decisions to Mr. Conrad, Judge Chmura's opponent in this election.

This exhibit depicts a police officer in a squad car with flashers operating on the roof of the vehicle with the words, "It didn't have to be this way." The JTC complains that this circular falsely suggests that Mr. Conrad was responsible for certain decisions relating to criminal matters made at the 37th District Court, and that terms "slap on the wrist" and "he's just a bureaucrat" in describing Mr. Conrad were misleading or deceptive.

The First part of the exhibit asks the question as to whether or not Mr. Conrad's court could have stopped "Murder . . . Rape . . . Dismemberment . . . Innocent Victims." As this is a question, it cannot be considered a

false or misleading statement. The second part of the exhibit contains statements of fact, which are analyzed in the context of the overall message of the exhibit. The first statement is "According to Court records, James Craig Cristini appeared in the 37th District Court at least 4 times while Jim Conrad was Court Administrator and Magistrate. Each time, he received only a slap on the wrist." As James Craig Cristini did appear in the 37th District Court several times, this statement is true and not violative of the canons. As the term "slap on the wrist" expresses an opinion as to how Cristini was treated, it is not a misstatement of fact and is not therefore violative of the canons.

The second statement is to the effect that James Cristini was once charged with assault and battery and was let back out for $100. This also was not an untrue statement in the context that it intended to convey the message that if a $100 bond would have been posted, he would have been released on that charge to appear in court thereafter. The third statement suggests that Cristini, after his release for certain offenses, committed murder and mayhem. The evidence also indicated that this statement was not untrue.

The following contains the language of the fourth and final statement:

> "The Result . . . Innocent victims, raped, murdered and dismembered."
>
> "That's what happens when you put bureaucrats in charge of a court. Jim Conrad . . . He's just a bureaucrat."

This statement is troubling because it suggests that Mr. Conrad was responsible for persons being raped, murdered and dismembered. The evidence elicited during the evidentiary hearing did not reveal that Mr. Conrad was in any way responsible for such occurrences. Furthermore, the evidence revealed that it was the judges, and not Mr. Conrad, who were in charge of the court, and that Mr. Conrad's involvement in the Cristini matter was very limited and had no bearing on Cristini's release from custody. As magistrate, he dismissed minor violations on motion of the prosecutor because Cristini was being held on a more serious charge. As the word "bureaucrat" is commonly used to describe governmental employees, and as Mr. Conrad was an employee of the court, its use in describing Mr. Conrad was not violative of the Canons of Judicial Ethics.

Conclusion

I find that the overall message of this circular (exhibit 3) was to suggest that Jim Conrad was in charge of the 37th District Court and that citizens were victimized as a result of his actions. This was a false message and therefore misleading because the average intelligent voter would have been misled by this exhibit. Therefore, the JTC has established by a preponderance of the evidence that the distribution of this exhibit to the electorate violated Canon 7(B)(1)(d) of the Judicial Canons of Ethics.

9(d) **Exhibit 4 – "Sexual Harassment"**

Exhibit 4 is a three-page circular regarding sexual harassment. The overall message suggests that sexual

harassment at work and violence at home should not be tolerated and that Mr. Conrad is facing trial for sexual harassment. The exhibit further claims that Mr. Conrad is attempting to avoid liability by asserting the defense of governmental immunity to plaintiff's complaint.

Page 1 of this exhibit contains a copy of a photograph of a woman, apparently at work, with someone's hand on her shoulder and a copy of a photograph of a woman and child with indications of bruising about their faces. The wording on this page of the exhibit is "We shouldn't have to worry about sexual harassment at work or violence at home." Certainly this page alone contains no misleading deceptive or untrue statements. The language merely states that which is desirable and ought to be sought by our society as a whole.

The second and third pages are divided into two parts, the upper part and the lower part. The lower part is about Judge Chmura and the upper part about Mr. Conrad. The lower part states that Judge Chmura is a tough judge who won't tolerate sexual harassment of court employees or criminals who prey on women. This part of the exhibit also contains a photograph of Judge Chmura and Macomb County Prosecutor Carl Marlinga with the statement attributed to Prosecutor Marlinga that Judge Chmura has worked well with his office and that he has been tough on crime in Warren and Centerline. As the evidentiary hearing did not reveal any misstatements of fact in this part of the exhibit, and as alluding to Judge Chmura as a tough judge does not violate the canons as previously noted, the JTC has failed to establish that this part of the exhibit was a violation of Canons 7 (B)(1)(d).

In the upper half of pages 2 and 3 is a copy of a photograph of Mr. Conrad with a former court reporter with her head on his shoulder, a copy of a photograph of the first page of the complaint against James Conrad filed in the Macomb County Circuit Court, a statement indicating that Mr. Conrad is accused of intimidating and firing a female employee because she complained of sexual harassment, and a statement that Conrad's lawyers claimed he couldn't be tried because of governmental immunity. There is also a statement that the complaint cost the taxpayers of Warren and Centerline thousands of dollars.

The copy of the photograph of Mr. Conrad and the former court reporter is innocuous, as is the copy of the first page of the civil complaint. As these photographs cannot be labeled in any context as misleading, untrue or deceptive, they do not violate the canons.

A review of the written matter further discloses that there are no untrue or substantial misstatements of fact. The evidence at the evidentiary hearing established that Mr. Conrad was a defendant in a sexual harassment case and the defense of governmental immunity was asserted. While it is true that former Macomb County Circuit Judge Raymond Cashen had dismissed the sexual harassment count in plaintiff's complaint prior to the time this circular was prepared and circulated, nonetheless at that time there still existed other viable counts in the complaint that contained language suggesting sexual harassment on the part of Mr. Conrad, and the decision of Judge Cashen did not change the fact that Ms. Meyer was still charging Mr. Conrad with sexual harassment. Given these circumstances, and the fact that the final chapter of this lawsuit

has not yet been written (the case is on appeal), these statements should not be considered misleading.

The final statement, which claims the lawsuit has cost the taxpayers of Warren and Centerline thousands of dollars, is not misleading for the following reason: Matt Seward, defense counsel for defendants in the civil action, testified that the cost of defense of this lawsuit was in the vicinity of $40,000. While it is true that an insurance carrier was directly paying the costs of defense, nonetheless, the premiums for that policy were presumably paid by the electorate and, as it is very likely the premiums for the policy will be increased as a result of the lawsuit, the statement is not substantially misleading.

The final page of this exhibit is not violative of the Canons of Ethics for the reason it merely sets forth background information about Judge Chmura, and indicates organizations to which he belongs.

Conclusion

While the exhibit is borderline because it is possible that a voter might determine from it exhibit that Mr. Conrad was guilty of some sexual wrongdoing, nonetheless a close reading of this circular does not suggest that Mr. Conrad had committed some wrongdoing but rather that a former employee of the 37th district court had alleged wrongdoing on Mr. Conrad's part and had pursued those allegations by commencing a lawsuit. This was not untrue.

Consequently, I find the JTC has failed to establish that the distribution of this exhibit constituted a violation of Canon 7 (B)(1)(d).

9(e). **Exhibit 5 – "Where is my courtroom"**

Exhibit 5 is a two-page document about Mr. Conrad. The first page of this exhibit illustrates a caricature of someone leaving a building stating "where is my courtroom." There is also language on this page in block letter stating, "No more bureaucrats." There exists nothing on this page that is violative of the canons. Page 2, in part, attempts to answer the question about Mr. Conrad not having a courtroom. The overall message conveyed is that Mr. Conrad is not a judge. Because Michigan judges are elected and because Mr. Conrad was never elected a judge, it was neither unfair nor misleading to characterize Mr. Conrad as not a judge. This was a contest for an elected judicial office. And, as Mr. Conrad had never held an elected judicial office, the respondent had a right to point this out in his campaign literature. The second part of this page asks the question – "So what has Jim Conrad been doing as Court Administrator for the past 7 years?" Directly beneath this question are certain statements that provide an answer to the question.

The first statement is "Murderers and Stalkers . . . back on the streets . . . commit crimes again . . . " This statement is untrue or at least misleading for the reason the average intelligent voter would take that statement to mean that someone who was either charged or had been convicted of murder was released by the 37th District Court. That did not happen. As the evidentiary hearing

did not reveal that anyone charged or convicted of murder was ever released by the 37th District Court, this statement violated the Canons of Ethics.

The second statement is "In case after case . . . Murderer James Craig Cristini . . . Stalker Edward Lightfoot . . . Hardened, violent criminals appeared in the 37th District Court again and again only to be let out the commit more crimes." As it is true that James Cristini and Edward Lightfoot had appeared in 37th District Court more than once and had been released, the statement is substantially true. It is noted that the thrust of this statement does not suggest that Cristini was ever released after he was charged and convicted of murder, as does the first statement.

The third statement is "Corruption and Inefficiency. . . . " As there was some evidence for a basis of this statement, i.e., a probation officer had been suspended for wrongful conduct, and because the word "Inefficiency" is a statement of opinion, there exists no violative of the canon.

The fourth statement or answer to the question is – "Federal investigators are looking into charges that the 37th District Court Probation department was running a scam under which court employees were receiving kickbacks, making big money off people's misery." The principal thrust of this statement is that the Federal Government was conducting an investigation into charges against the 37th District Court Probation Department. There is no claim in this statement that anyone committed wrongful acts, only that the Federal Government was investigating into charges of wrongful conduct.

As there existed no testimony that such an investigation did not occur, the JTC has not sustained its burden of proof on this issue.

The fifth statement is "Sued for Sexual Harassment. . . . " As Mr. Conrad had been sued for sexual harassment, this statement is neither untrue nor misleading.

The sixth statement reads as follows:

> When court employee Carrie Meyer complained about the way she was treated at work, Jim Conrad threatened her job, demoted her, and harassed her. Conrad's actions have resulted in a major sexual harassment lawsuit which has cost Warren and Centerline thousands to defend. But what's Conrad's defense? That he shouldn't be prosecuted because of governmental immunity

What is troubling about this statement is that it is stating *as fact* that Mr. Conrad threatened Ms. Meyer's job, demoted her and harassed her when she complained about the way she was treated at work. It does not state that this was a claim that was made by Ms. Meyer in her lawsuit. As Mr. Conrad denied harassment of Ms. Meyer and as, even to this date, the claim of Ms. Meyer has not been proven in court, the statement in the circular was at least misleading because the claims against Mr. Conrad were set forth as actual facts and not as allegations.

The conclusionary statement in this exhibit 5 states "That's what happens when you put bureaucrats in charge of a court." "Jim Conrad . . . He's just a bureaucrat." The thrust of this statement suggests that Mr. Conrad was in charge of the court, and was responsible for a

murderer being released, for threatening Ms. Meyer, for demoting her and harassing her. This was a false message and therefore violative of the canon. Mr. Conrad was not in charge of the court, was not responsible for releasing any murderers, nor was it established that he had ever harassed Ms. Meyer.

Conclusion

The JTC has sustained its burden of proof of establishing that exhibit 5 does not conform to the requirement of Canon 7(B)(1)(d) of the Canons of Judicial Ethics.

9(f). **Exhibit 6 – End of Fear II**

The obvious principal purpose of this circular is to portray Judge Chmura as a "tough judge." The first page of this 2-page exhibit contains a copy of a photograph of a door locked with a link chain with the words, "end the Fear" and also contains a copy of a photograph of Judge Chmura shaking hands with the prosecutor of Macomb County, Carl Marlinga, with the words, " 'Judge Chmura has worked well with my office and has been tough on crime in Warren and Centerline' – Carl Marlinga, Macomb County Prosecutor." There exists nothing on this page that violates the Canons of Judicial Ethics. There has been no proof that the statement of Prosecutor Marlinga was not true or that Prosecutor Marlinga did not make the statement. The copy of the photograph of the locked door is innocuous and not offensive.

The second page portrays Judge Chmura on the bench with his gavel in hand along with a picture of

someone behind the bars of a prison, with the words, "Thanks to Judge John Chmura, you no longer have to fear these violent criminals." Other wording suggests that certain criminals were "off our streets" and a conclusionary statement that "hundreds of other violent criminals – they are off our streets." "Retain Judge John Chmura . . . One Tough Judge."[1]

The principal objection to this exhibit by the JTC was that Judge Chmura had not been on the bench long enough to put hundreds of violent criminals behind bars. While Judge Chmura at the evidentiary hearing stands by this statement, Judge Chmura's court reporter, Julie Kennedy, believed that "hundreds was an exaggeration." Given the testimony of the witnesses, no violation of the canons is found. While there may have been puffing in this circular, there existed no testimony that an actual "count" had been made of the actual number of persons Judge Chmura had sentenced to jail and as it is not likely that the average intelligent voter would be misled by generalizations such as "hundreds," no violation of the Canons of Judicial Ethics occurred.

Conclusion

JTC has failed to establish that this exhibit was a violation of Canon 7(B)(1)(d) of the Canons of Judicial Ethics.

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[1] As the issue of portraying oneself as a tough judge has already been addressed and found not to be violative of the Canons of Ethics, it will not be addressed further.

10. The JTC has also complained that Judge Chmura's conduct violated court rules and other canons of ethics in that his acts:

a. constituted misconduct;
b. were prejudicial to the administration of justice;
c. were improper, generating unnecessary controversy and eroding public confidence in the judiciary;
d. failed to maintain the dignity appropriate for judicial office;
e. were acts of impropriety or acts giving the appearance of impropriety;
f. were acts that exposed the legal profession to oblique contempt, censure or reproach;
g. were acts contrary to judicial ethics, honesty or good morals; and
h. were acts that impeded the JTC's investigation into this matter.

11. That the JTC has failed to establish by a preponderance of evidence that Judge Chmura has committed these alleged violations, including the allegation that he impeded the JTC investigation.

Conclusion

The JTC has failed to establish by a preponderance of the evidence that the above-mentioned allegations were a violation of the Canons of Ethics or the Court Rules. It has already been determined that Judge Chmura's conduct did not constitute actual malice as defined in *NY Times v Sullivan*. His speech, therefore, during the judicial campaign was constitutionally protected. It is noted that

the First Amendment protects all kinds of unpopular speech. Consequently, it is possible that a judicial candidate exercising his freedom of speech rights may very well cause harm and engender disrespect to the judiciary and legal profession. For instance, if a sitting judge informs the electorate during a judicial campaign that his or her challenger had committed a private sexual indiscretion which had happened many years ago, a large segment of the electorate would likely find this disclosure quite disturbing, bringing disrespect to both the judiciary and the legal community. Nevertheless, is the disclosure sanctionable if it is true? The answer must be "no" because the proper exercise of one's freedom of speech rights, in any public election, cannot be the subject matter of censure. Consequently, as actual malice as defined by *NY Times v Sullivan* has not been established regarding Judge Chmura's conduct, the above allegations relating to his campaign conduct does not constitute a violation of the canons or court rules.

Conclusions of Law

1. That Canon 7(B)(1)(d) of the judicial Canons of Ethics is unconstitutional on its face for the reason the language is vague, overbroad and does not provide fair notice of that speech which it seeks to restrict, and because the canon does not specifically provide that any false, misleading or deceptive material must be made with actual malice in order to be sanctionable.

2. That if Canon 7(B)(1)(d) in its present form is found to be constitutional by the JTC or the Michigan Supreme Court and it is determined that the present

language of the canon should be construed in a manner that the requirement of establishing actual malice is included within the meaning of the canon, the complaint against Judge Chmura still must fail for the reason that JTC's complaint does not allege malice as defined in *N.Y. Times*, nor did the proofs establish actual malice on Judge Chmura's part. Judge Chmura neither prepared the exhibits nor did he conduct the background investigation concerning the material contained in the exhibits.

3. That if Canon 7(B)(1)(d) is found to be constitutional in its present form by the JTC and Supreme Court and actual malice, as defined by *N.Y. Times*, need not be proven in order to establish a violation of the canon, the JTC has sustained its burden of proof of establishing that Exhibits III and V violated the canon for the reason that the average intelligent voter would have been mislead by the meaning conveyed to the electorate in these exhibits.

4. That if Canon 7(B)(1)(d) is found to be constitutional in its present form by the JTC and Supreme Court and actual malice, as defined by *N.Y. Times*, need not be proven in order to establish a violation of the canon, the JTC has failed to sustain its burden of proof of establishing that Exhibits I, II, IV and VI violated the canon for the reason that the average intelligent voter would not have been mislead by the messages conveyed to the electorate in these exhibits.

5. That the JTC has failed to sustain its burden that Judge Chmura violated any other canon or court rule

because it did not establish that Judge Chmura acted with actual malice, as defined by *NY Times*.

/s/ John R. Kirwan
JOHN R. KIRWAN
Master

ADDENDUM

It has been argued that is the Canons of Judicial Ethics are not restrictive in what candidates for judicial office can do and say during judicial campaign, that such campaigns will become very ugly, bringing disrespect upon the judiciary and causing a loss of public confidence in the legal system. While this may be true to some degree, this is not a sufficient reason to dilute freedom of speech rights guaranteed in both the U.S. and Michigan Constitution. Court decisions analyzing rights under the First Amendment have allowed all sorts of unpopular speech and actions which it could be argued brought disrespect to the court. Yet the courts have survived and will continue to survive. This is not, however, meant to suggest that we should not continue in our efforts to elevate judicial campaigns to a higher level. A recent article in the Michigan Bar Journal (March 1999) by Thomas Byerly, regulation counsel for the State Bar, indicates that the State Bar's Board of Commissioners implemented a pilot program for the 1998 Judicial campaign involving the voluntary participation of candidates for judicial office consenting to an agreement regarding judicial campaign conduct. This program apparently proved successful and demonstrates that there are other means to address this problem without diluting freedom of speech

rights. One way of forcefully encouraging candidates to participate in such a program would be to give wide and extensive publication, with the cooperation of the media, of the names of those candidates who will not agree to participate in this voluntary program. This would allow the electorate to take this factor into consideration when voting.

/s/ John R. Kirwan
JOHN R. KIRWAN
Master